

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT.

C. K. KING, AS ADMINISTRATOR OF THE
ESTATE OF J. W. SMITH, DECEASED,
Plaintiff in Error,

vs.

CHARLES H. SMITH AND THE
CALIFORNIA SAFE DEPOSIT
AND TRUST COMPANY (A
CORPORATION),
Defendants in Error.

TRANSCRIPT OF RECORD.

In Error to the Circuit Court of the United States,
of the Ninth Judicial Circuit, in and
for the Northern District
of California.



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*In the Circuit Court of the United States, Ninth Circuit,
Northern District of California.*

CHARLES H. SMITH,

Complainant,

vs.

CALIFORNIA SAFE DEPOSIT AND
TRUST COMPANY (a Corporation),
and C. K. KING, as Administrator of
the Estate of J. W. SMITH, Deceased,
Defendants.

Complaint.

Comes now the plaintiff and complaining of the above-named defendants for cause of action alleges:

That said plaintiff is now, and at all the times hereinafter named was, a citizen of the State of Colorado, United States of America.

That the defendant, the California Safe Deposit and Trust Company, is and at all the times hereinafter named was a corporation duly incorporated and acting under the laws of the State of California, and having its principal place of business in the city and county of San Francisco, State of California.

That C. K. King is, and at all the times hereinafter named was, a citizen and resident of the State of California and a resident within the Northern District of California in the Ninth Circuit of the Circuit Court of the United States.

That heretofore, to wit, on the 16th day of November, 1895, J. W. Smith died a citizen and resident of the county of Alameda, State of California.

That afterwards, to wit, on the 9th day of December, 1895, an order was duly given, made and entered in the Superior Court in and for the County of Alameda, State of California, appointing C. K. King, administrator of the estate of said J. W. Smith, deceased; that afterwards, to wit, on the —— day of December, 1895, said C. K. King duly qualified as such administrator and letters of administration were duly and regularly issued to him out of the said Superior Court; that said letters, so issued as aforesaid, have never been revoked, and said C. K. King at all the times hereinafter named was and now is the duly qualified and acting administrator of the estate of J. W. Smith, deceased.

That on the 26th day of September, 1900, said plaintiff was the owner and entitled to the possession of the following described personal property, to wit, one hundred and ninety (190) bonds of the California and Nevada Railroad Company, of the face value of one thousand dollars (\$1,000) each, numbered 20 to 42, inclusive, 54 to 200, inclusive, and 206 to 225, inclusive; that said property is of the value of fifty thousand dollars.

That said defendants on said 26th day of September, 1900, were, and ever since have been in the possession of said personal property. That before the commencement of this action, to wit, on the 26th day of September, 1900, the plaintiff demanded of and from the defendants the possession of said personal property; but to deliver the

possession thereof the defendants refused and still refuse. That the said defendants still unlawfully withhold and detain the possession of said property from the possession of plaintiff to his damage in the sum of five dollars.

That the said C. K. King, as administrator of said estate claims that said property belongs to and is the property of the estate of J. W. Smith, deceased.

That said defendant, California Safe Deposit and Trust Company, claims to hold said property for said defendant C. K. King, as administrator of said estate. That the same has not been taken for a tax, assessment or fine pursuant to a statute, or seized under an execution or attachment against the property of the plaintiff.

Wherefore, the plaintiff demands judgment against said defendants for the recovery of the possession of said personal property, or the sum of fifty thousand dollars, the value thereof, in case a delivery cannot be had, together with five dollars damages, and for costs of suit.

GALPIN & BOLTON,
Attorneys for Plaintiff.

[Endorsed]: Filed September 28th, 1900. Southard Hoffman, Clerk.

UNITED STATES OF AMERICA.

*Circuit Court of the United States, Ninth Circuit, Northern
District of California.*

CHARLES H. SMITH,

Plaintiff,

vs.

CALIFORNIA SAFE DEPOSIT AND
TRUST COMPANY, and C. K. KING,
as Administrator of the Estate of J.
W. SMITH, Deceased,

Defendants.

Summons.

Action brought in the said Circuit Court, and the complaint filed in the office of the clerk of said Circuit Court, in the City and County of San Francisco.

The President of the United States of America, Greeting,
to California Safe Deposit and Trust Company (a
Corporation) and C. K. King, as Administrator of
the Estate of J. W. Smith, Deceased, Defendants.

You are hereby directed to appear and answer the complaint in an action entitled as above, brought against you in the Circuit Court of the United States, Ninth Circuit, in and for the Northern District of California, within ten days after the service on you of this summons—if served within this county; or within thirty days if served elsewhere.

And you are hereby notified that unless you appear and answer as above required, the said plaintiff will take

judgment for any money or damages demanded in the Complaint, as arising upon contract, or he will apply to the Court for any other relief demanded in the complaint.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the United States, this 28th day of September, in the year of our Lord one thousand nine hundred and of our independence the one hundred and twenty-fifth.

[Seal]

SOUTHARD HOFFMAN,

Clerk.

United States Marshal's Office, }
Northern District of California. }

I hereby certify and return that I received the within writ of the 29th day of September, 1900, and personally served the same on the 29th day of Sept., 1900, upon C. K. King, as administrator of the estate of J. W. Smith, deceased by delivering to and leaving with C. K. King, as administrator of the estate of J. W. Smith, deceased, one of said defendants named therein personally at Oakland, county of Alameda in said district, a certified copy thereof, together with a copy of the complaint, certified to by plaintiff's attorneys attached thereto.

San Francisco, Sept. 29th, 1900.

JOHN H. SHINE,

United States Marshal.

By Geo. B. Burnham,

Office Deputy.

[Endorsed]: Filed Dec. 10, 1900. Southard Hoffman, Clerk.

*In the Circuit Court of the United States, in and for the
Ninth Judicial Circuit and Northern District of California.*

CHARLES H. SMITH,

Plaintiff,

vs.

CALIFORNIA SAFE DEPOSIT AND
TRUST COMPANY (a Corporation)
and C. K. KING, Administrator of
the Estate of J. W. SMITH, Deceased.

Demurrer of Defendant C. K. King, etc.

The defendant, C. K. King, sued as administrator of the estate of J. W. Smith, deceased, demurs to the complaint in the above-entitled action on the following grounds:

1. That said complaint does not state facts sufficient to constitute a cause of action.

2. That said complaint is uncertain in this, that the property involved in said action is not sufficiently described to enable the same to be identified from such description.

3. That said complaint is ambiguous in this, that it cannot be ascertained therefrom, whether said action is in claim and delivery of personal property, or an action to determine adverse claims to the title of the property involved therein.

4. That said complaint is uncertain for the reasons stated in the last preceding paragraph hereof.

Wherefore, this defendant prays to be hence dismissed with his costs herein incurred.

WHITWORTH & SHURTLEFF,
Attorneys for Defendant C. K. King.

CERTIFICATE.

We, the undersigned, attorneys and counsel for the defendant, C. K. King; sued as administrator of the estate of J. W. Smith, deceased, hereby certify that; in our opinion, the above and foregoing demurrer is well founded in point of law.

WHITWORTH & SHURTLEFF,
Attorneys for Defendant C. K. King.

CHAS. A. SHURTLEFF and

J. M. WHITWORTH

Of Counsel.

[Endorsed]: Filed October 29th, 1900. Southard Hoffman, Clerk.

*In the Circuit Court of the United States, Ninth Circuit,
Northern District of California.*

CHARLES H. SMITH,

Plaintiff,

vs.

THE CALIFORNIA SAFE DEPOSIT
& TRUST COMPANY (a Corporation),
and C. K. KING, as Administrator of
the Estate of J. W. SMITH, Deceased.
Defendants.

Amended Complaint.

Comes now the plaintiff and makes and files his amended complaint, and complainant of the above-named defendant, for cause of action alleges:

That said plaintiff is now, and at all the times hereinafter named was, a citizen of the State of Colorado, United States of America.

That the defendant, the California Safe Deposit & Trust Company is, and at all the times hereinafter named was, a corporation duly incorporated and acting under the laws of the State of California, and having its principal place of business in the city and county of San Francisco, State of California.

That C. K. King is, and at all the times hereinafter named was a citizen and resident of the State of California and a resident within the Northern District of Cali-

fornia, in the Ninth Circuit of the Circuit Court of the United States.

That heretofore, to wit, on the 16th day of November, 1895, J. W. Smith died, a citizen and resident of the county of Alameda, State of California.

That afterwards, to wit, on the 9th day of December; 1895, an order was duly given, made and entered in the Superior Court in and for the County of Alameda, State of California, appointing C. K. King administrator of the estate of said J. W. Smith, deceased; that afterwards, to wit, on the ——— day of December, 1895, said C. K. King duly qualified as such administrator and letters of administration of said estate were duly and regularly issued to him out of the said Superior Court; that said letters, so issued as aforesaid have never been revoked, and said C. K. King, at all the times hereinafter named was and now is the duly qualified and acting administrator of the estate of J. W. Smith, deceased.

That on the 26th day of September, 1900, said plaintiff was, ever since has been, and still is the owner and entitled to the possession of the following described personal property, to wit: one hundred and ninety bonds of the California and Nevada Railroad Company, of the face value of one thousand dollars (\$1,000) each, numbered twenty to forty-two, inclusive, fifty-four to two hundred, inclusive, and two hundred and six to two hundred and twenty-five, inclusive; said bonds being dated the 10th day of April, 1884, and being the same bonds delivered by the plaintiff to the defendant, California Safe Deposit and Trust Company.

That said property is of the value of fifty thousand (\$50,000) dollars.

That said defendants, on the 26th day of September, 1900, were, and ever since have been, and now are in the possession of said personal property.

That before the commencement of this action, to wit, on the 26th day of September, 1900, the plaintiff demanded of and from the defendants the possession of said personal property, but to deliver the possession thereof, the defendants refused and still refuse; that the said defendants still unlawfully withhold and detain the possession of said property from the possession of the plaintiff, to his damage in the sum of five (\$5) dollars.

That the said C. K. King, as administrator of said estate, claims that said property belongs to and is the property of the estate of J. W. Smith, deceased.

That said California Safe Deposit & Trust Company claims to hold said property for said defendant, C. K. King, as administrator of said estate; that said property has not been taken for a tax, assessment or fine, pursuant to a statute, or seized under an execution or attachment against the property of the plaintiff.

Wherefore, the plaintiff demands judgment against said defendants for the recovery of the possession of said personal property or the sum of fifty thousand (\$50,000) dollars, the value thereof, in case a delivery cannot be had, together with five (\$5) dollars damages, and for costs of suit.

GALPIN and BOLTON,
Attorneys for Plaintiff.

State of California,
City and County of San Francisco. } ss.

A. E. Bolton, being duly sworn, deposes and says that he is one of the attorneys for the plaintiff in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated on information and belief, and that as to those matters he believes it to be true; that the said plaintiff is a non-resident of the State of California and absent from the State of California and from the city and county of San Francisco; that the attorneys for plaintiff are residents of the State of California; that affiant is a resident of the county of Alameda, State of California; that by reason of the absence of the said plaintiff from the place of residence of his said attorneys and from the State of California he is unable to verify this complaint; that said complaint is for that reason verified by affiant.

A. E. BOLTON.

Subscribed and sworn to before me this 22d day of November, 1900.

[Seal]

GEORGE PATTISON,

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed November 22d, 1900. Southard Hoffman, Clerk. By W. B. Beazley, Deputy Clerk.

*In the Circuit Court of the United States, Ninth Circuit,
Northern District of California.*

CHARLES H. SMITH,

Plaintiff,

vs.

THE CALIFORNIA SAFE DEPOSIT
& TRUST COMPANY (a Corpora-
tion), and C. K. KING, as Administra-
tor of the Estate of J. W. SMITH, De-
ceased,

Defendants.

Answer of C. K. King, as Administrator, etc.

C. K. King, administrator of the estate of J. W. Smith, deceased, one of the defendants in the above-entitled action, for his separate answer to the amended complaint therein—

1. Denies upon and according to his information and belief, that the plaintiff is now or was at any of the times mentioned in the complaint a citizen of the State of Colorado, United States of America.

2. Denies that on the 26th day of September, 1900, the plaintiff was, or ever since has been or still is, or ever was, the owner or entitled to the possession of the personal property described in the complaint or any part or portion thereof.

3. Denies that said personal property is or ever was at any of the times mentioned in the complaint of the

value of \$50,000, but alleges that the value thereof is much less than the said sum, but the precise value thereof this defendant does not know and therefore cannot state herein.

4. Denies that said defendants, or that this defendant, on the 26th day of September, 1900, were or ever were in the possession of said property or any part thereof; this defendant alleges on information and belief that the said J. W. Smith was, prior to and at the time of his death, the owner of the said personal property, and of the whole thereof, and that the estate of J. W. Smith, deceased, is now and at all times since the death of J. W. Smith, deceased, has been the owner of, and that this defendant, as the administrator of the estate of said deceased, is and at all times mentioned in said complaint has been entitled to the possession of the said personal property and the whole thereof.

5. Denies that said defendants, or that this defendant, unlawfully withholds or detains the possession of the said property or any part thereof from the possession of the plaintiff, or that plaintiff is damaged in the sum of \$5.00 or any sum whatever.

6. As to the allegations in said complaint that the defendant, California Safe Deposit and Trust Company, claims to hold said property for said defendant C. K. King, as administrator of said estate of J. W. Smith, deceased, this defendant has no information or belief upon the subject sufficient to enable him to answer said allegation, and placing his denial on that ground, denies that said California Safe Deposit and Trust Company

claims to hold said property for said defendant C. K. King, as administrator of said estate or otherwise.

Wherefore, this defendant demands judgment against the plaintiff for his costs herein incurred, and for the delivery to the defendant as such administrator of the said property and the whole thereof.

WHITWORTH & SHURTLEFF,
Attorneys for Defendant C. K. King, Administrator.

State of California, }
City and County of San Francisco. } ss.

C. K. King, being duly sworn deposes and says that he is one of the defendants in the above-entitled action; that he has heard read the foregoing answer and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated on information and belief, and that as to those matters he believes it to be true.

C. K. KING.

Subscribed and sworn to before me this third (3d) day of December, 1900.

[Seal] ALFRED A. ENQUIST,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Service of the within answer admitted by copy this 2d day of December, 1900.

GALPIN & BOLTON,
Attys. for Plff.

Filed December 3d, 1900. Southard Hoffman, Clerk.

*In the Circuit Court of the United States, Ninth Circuit,
Northern District of California.*

CHARLES H. SMITH,

Plaintiff,

vs.

THE CALIFORNIA SAFE DEPOSIT
AND TRUST COMPANY (a Corpora-
tion), and C. K. KING, as Adminis-
trator of the Estate of J. W. SMITH,
Deceased,

Defendants.

Answer of California Safe Deposit and Trust Co.

The defendant, California Safe Deposit and Trust Company, answering plaintiff's complaint, denies as follows:

This defendant has no information or belief sufficient to enable it to answer the allegation that on the 26th day of September, 1900, said plaintiff was, ever since has been and still is the owner and entitled to the possession of the personal property described in the complaint, and placing its denial upon that ground denies that on the 26th day of September, 1900, or ever, or at all, the plaintiff was the owner or entitled to the possession of said described personal property or any part thereof.

Denies that this defendant unlawfully withholds the possession of said property from this plaintiff, and denies that plaintiff has suffered any damage by reason of the acts complained of in said complaint.

Wherefore, defendant prays to be hence dismissed with its cost.

GUNNISON, BOOTH & BARNETT,
Attorneys for Defendant, California Safe Deposit and
Trust Company.

United States of America,
Northern District of California,
City and County of San Francisco. } ss.

E. E. Shotwell, being duly sworn, deposes and says that he is the secretary of the California Safe Deposit and Trust Company, a corporation defendant in the above-entitled action; that he has read the foregoing answer and knows the contents thereof; that the same is true of his own knowledge, except as to those matters which are therein stated on information and belief, and as to those matters that he believes it to be true.

E. E. SHOTWELL.

Subscribed and sworn to before me this —— day of
March, A. D. 1901.

[Seal]

SOUTHARD HOFFMAN,
Clerk United States Circuit Court.

[Endorsed]: Filed March 12, 1901. Southard Hoffman,
Clerk.

*In the Circuit Court of the United States, Ninth Circuit,
Northern District of California.*

CHARLES H. SMITH,

Plaintiff,

vs.

CALIFORNIA SAFE DEPOSIT AND
TRUST COMPANY (a Corporation),
and C. K. KING, as Administrator of
the Estate of J. W. SMITH,

Defendants.

Stipulation Waiving Jury.

It is hereby stipulated and agreed that a jury may be
and is waived in the above-entitled cause.

Dated March 12th, 1901.

GALPIN & BOLTON,

Attys. for Plff.

WHITWORTH & SHURTLEFF,

Attys. for Deft. King.

GUNNISON, BOOTH & BARTNETT,

Attys. for Deft. California Safe Deposit & Trust Co.

[Endorsed]: Filed March 12, 1901. Southard Hoff-
man, Clerk.

*In the Circuit Court of the United States, Ninth Circuit,
Northern District of California.*

CHARLES H. SMITH,

Plaintiff,

vs.

THE CALIFORNIA SAFE DEPOSIT
AND TRUST COMPANY (a Corpora-
tion), and C. K. KING, as Adminis-
trator of the Estate of J. W. SMITH,
Deceased,

Defendants.

Findings of Fact.

The cause coming on regularly to be heard before the Court sitting without a jury, a trial by jury having been expressly waived by plaintiff and defendant, Messrs. Galpin & Bolton appearing for plaintiff, Messrs. Gunnison, Booth & Barnett appearing for defendant California Safe Deposit & Trust Company, and Messrs. Whitworth & Shurtleff, and W. N. Cannon appearing as attorneys for the defendant C. K. King, oral and documentary evidence was introduced by said parties respectively, the cause was submitted to the Court for decision, the Court now finds the following facts:

1. The plaintiff at the time of the commencement of said action was and now is a citizen of the State of Colo-

rado, United States of America. That defendants then were and now are citizens of the State of California.

2. The plaintiff, on the 26th day of September, 1900, was, ever since has been, and still is the owner and entitled to possession of the property described in the complaint; and said property was at all of said dates and times of the value of forty-seven thousand five hundred dollars (\$47,500); the defendants at all said dates and times unlawfully withheld and now retain the possession of said property described in plaintiff's complaint from the possession of the plaintiff.

3. At all said dates the defendant, the California Safe Deposit and Trust Company, did not claim, nor does it now claim to have, nor does it have any interest in said property except as bailee of plaintiff, but now withholds said property from the possession of plaintiff on the claim that it is property of defendant King, as administrator of the estate of J. W. Smith, deceased.

4. That neither defendant King, as administrator of the estate of J. W. Smith, deceased, nor said estate of J. W. Smith, deceased, has or ever had any interest in said property and the defendant C. K. King, as administrator of said estate, is not entitled to the possession of said personal property, or any part thereof, nor is said defendant corporation entitled to longer hold possession thereof from plaintiff.

CONCLUSION OF LAW.

That the plaintiff is entitled to recover of and from the defendants the possession of the property alleged and set forth in plaintiff's complaint; and that defendants unlawfully withhold the possession thereof.

March 26th, 1901.

WM. W. MORROW,
Judge.

[Endorsed]: Filed March 26, 1901. Southard Hoffman, Clerk. By W. B. Beazley, Deputy Clerk.

*In the Circuit Court of the United States, Ninth Judicial
Circuit, Northern District of California.*

CHARLES H. SMITH,

Plaintiff,

vs.

CALIFORNIA SAFE DEPOSIT AND
TRUST COMPANY (a Corporation),
and C. K. KING, as Administrator of
the Estate of J. W. SMITH, Deceased.

Defendants.

No. 12,983.

Judgment on Findings.

This cause having come on regularly for trial upon the 12th day of March, 1901, being a day in the March, 1901, term of said Court, before the Court sitting without a

jury, a trial by jury having been waived by stipulation of the attorneys for the respective parties filed herein, Messrs. Galpin & Bolton, appearing for plaintiff, Messrs. Gunnison, Booth & Bartnett, appearing for defendant, California Safe Deposit and Trust Company, a corporation, and Messrs. Whitworth & Shurtleff and W. M. Cannon appearing for the defendant C. K. King, as administrator of the estate of J. W. Smith, deceased, and the trial having been proceeded with upon the 13th, 14th and 15th days of March, 1901, and evidence, oral and documentary, upon behalf of plaintiff and upon behalf of the defendant King, as administrator etc., having been introduced, and the evidence having been closed, the cause was after arguments of the attorneys for plaintiff and said defendant King, submitted to the Court for consideration and decision.

And the Court, after due deliberation, having filed its findings in writing, and ordered that judgment be entered herein in accordance therewith and for costs;

Now, therefore, by virtue of the law and by reason of the findings aforesaid, it is considered by the Court that Charles H. Smith, plaintiff herein, do have and recover of and from The California Safe Deposit and Trust Company, a corporation, and C. K. King, as administrator of the estate of J. W. Smith, deceased, defendants herein (who unlawfully withhold the same), the possession of one hundred and ninety (190) bonds of the California and Nevada Railroad Company, a corporation, numbered as follows to wit: 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73,

74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, and 225, now in the possession of said defendants, or either of them.

And it is further considered and adjudged that said plaintiff, Charles H. Smith, recover from said defendants, California Safe Deposit and Trust Company, a corporation; and C. K. King, as administrator of the estate of J. W. Smith, deceased, his costs in this behalf expended, taxed at \$.

Judgment entered March 26th, 1901.

SOUTHARD HOFFMAN,

Clerk.

I hereby certify the foregoing to be a full, true, and correct copy of an original judgment entered in the therein entitled cause.

Attest my hand and the seal of said Circuit Court, this 26th day of March, A. D. 1901.

[Seal]

SOUTHARD HOFFMAN,

Clerk.

By W. B. Beazley,

Deputy Clerk.

[Endorsed]: Filed March 26, 1901. Southard Hoffman,
Clerk.

*In the Circuit Court of the United States, Ninth Judicial
Circuit, in and for the Northern District of California.*

CHARLES H. SMITH

vs.

CALIFORNIA SAFE DEPOSIT AND
TRUST CO., et al.

} No. 12,983.

Certificate to Judgment-roll.

I, Southard Hoffman, clerk of the Circuit Court of the United States, for the Ninth Judicial Circuit, Northern District of California, do hereby certify that the foregoing papers hereto annexed constitute the judgment-roll in the above-entitled action.

Attest my hand and the seal of said Circuit Court this 26th day of March, 1901.

[Seal]

SOUTHARD HOFFMAN,

Clerk.

By W. B. Beazley,

Deputy Clerk.

[Endorsed]: Filed March 26, 1901. Southard Hoffman,
Clerk. By W. B. Beazley Deputy Clerk.

*In the Circuit Court of the United States, Ninth Circuit,
Northern District of California.*

CHARLES H. SMITH,

Plaintiff,

vs.

THE CALIFORNIA SAFE DEPOSIT
AND TRUST COMPANY (a Corpora-
tion), and C. K. KING, as Administra-
tor of the Estate of J. W. SMITH, De-
ceased,

Defendants.

No. 12,983.

Opinion.

Action at law, for the recovery of certain railroad bonds.

Galpin & Bolton, Attorneys for Plaintiff.

Gunnison, Booth & Bartnett, Attorneys for Defend-
ant California Safe Deposit & Trust Company.

Whitworth & Shurtleff and Wm. M. Cannon, Attor-
neys for Defendant C. K. King, as Administrator.

MORROW, Circuit Judge.—This is an action wherein the plaintiff, Charles H. Smith, a citizen of the State of Colorado, seeks to recover from the defendants 190 bonds of the California & Nevada Railroad Company, of the face value of \$1,000 each.

It is alleged in the complaint that the defendants on the 26th day of September, 1900, were, and ever since have been, and now are, in the possession of the said property; that the defendant C. K. King claims the property as the administrator of the estate of J. W. Smith, deceased, and that the defendant California Safe Deposit & Trust Company claims to hold the bonds for the defendant King as such administrator.

The bonds in controversy are part of a lot of 304 bonds of the California & Nevada Railroad Company, each bond of the par value of \$1,000. These bonds were originally issued by the California & Nevada Railroad Company in the year 1889, and 229 of the bonds were delivered by the company to J. W. Smith, the father of the plaintiff, in satisfaction of a certain contract relating to the building of a portion of the road. J. W. Smith also received an order upon the Central Trust Company of New York for 75 additional bonds, making a total of 304 bonds.

It appears that on March 15, 1893, J. W. Smith entered into an agreement with one J. S. Emery for the sale to the latter of the 304 bonds just described, for a stipulated price. This agreement provided for the payment of the sum stipulated in installments, the bonds being deposited during the existence of the contract in escrow with Abner Doble, of San Francisco, until the full payment should be made by Emery. This agreement was not carried out, and another agreement, dated October 24, 1893, was substituted, wherein J. W. Smith agreed to sell the bonds to F. M. Smith upon the terms therein provided. This agreement was for an option, to continue for one

year, and contained a provision for its extension for an additional year upon the same terms and conditions. The agreement contained in this second contract was not carried out during the first year, and it was accordingly extended for the additional year, and finally expired on October 24, 1895. Under this second contract the bonds were continued on deposit with Abner Doble in escrow to be delivered to F. M. Smith upon his compliance with the stipulations therein contained; otherwise Doble was to return the bonds to J. W. Smith or his legal representatives. It does not appear that F. M. Smith complied with the terms of the contract, and on October 24, 1895, the optional agreement with F. M. Smith having expired, the bonds were thereafter subject to the order of J. W. Smith.

It appears that in August, 1895, J. W. Smith, being at that time about eighty years of age and in feeble health, deemed it wise to distribute his property among his children. His reason for doing this was that litigation might be avoided in the distribution of his estate after his death. He accordingly, on August 14, 1895, executed deeds to certain separate parcels of real estate situated in this state and elsewhere, conveying the same to his different children, and it is claimed by the plaintiff that at this time his father gave him the bonds in question as part of his share of the property distributed, and executed and delivered to him a formal assignment of the same.

J. W. Smith died in Oakland on the 15th of November, 1895. The day before his death the plaintiff applied to Abner Doble for the 229 bonds on deposit with him, and

upon executing a receipt signed "J. W. Smith, by C. H. Smith," the bonds were delivered to the plaintiff and by him subsequently delivered to the California Safe Deposit & Trust Company, to hold under another agreement executed between C. H. Smith and A. A. Grant. After this deposit of the bonds, a demand was made by the plaintiff for their return. In the meantime C. K. King appears to have applied to the Safe Deposit Company for delivery of the bonds to him, as administrator of the estate of J. W. Smith. The Safe Deposit Company refused to deliver the bonds to plaintiff, and he instituted the present action.

There is no substantial conflict in the testimony in the case. The only question is as to whether it establishes the fact that prior to his death J. W. Smith gave the bonds in question to his son Charles H. Smith, the plaintiff.

The witness Abner Doble, referring to the receipt for the bonds, dated San Francisco, November 14, 1895, executed by Charles H. Smith and signed "J. W. Smith by C. H. Smith," when asked "How did you happen to deliver these bonds to Mr. Smith (referring to Charles H. Smith) upon this receipt?" replied: "I cannot remember distinctly, only I think my impression is, that Captain J. W. Smith had told me that the bonds belonged to Charley Smith, and to give them to him." In answer to the question, "How long before this occurrence had you seen J. W. Smith?" the witness replied: "It had only been a short time. I was over there to see him a short time before he died." Again, referring to a conversation be-

tween the witness and J. W. Smith, the witness said: "My impression is he told me that the bonds belonged to Charley, and to deliver them to him. I think that is why I did so. I think that conversation was the groundwork of my delivering the bonds to his son." The witness was asked if he remembered ever having received a written order from J. W. Smith. His answer was, "I don't remember ever getting any direct order from him. I delivered them on account of what he told me, that they belonged to his son; and when his son came for them, I delivered them."

This evidence, it seems to me, establishes the fact that Doble delivered the bonds to the plaintiff Charles H. Smith as his property, pursuant to the conversation of the witness with J. W. Smith. But, aside from this declaration, there is other testimony to the effect that J. W. Smith had given these bonds to his son Charles H. Smith.

The witness W. R. Thomas was the notary public who took the acknowledgments of J. W. Smith on the 14th of August, 1895, to certain deeds making conveyances to the children of the grantor. He was asked to state whether or not at any time when he visited J. W. Smith the latter made any statement about the disposition of his property. The witness answered that J. W. Smith said that he had deeded away all of his property, so that, in the event of his dying, there would be no trouble about his estate. The witness stated that prior to taking the acknowledgments to the deeds on August 14, 1895, Mr. Smith told him he was going to deed away all of his property before his death, and said to him, "I want you to

make out a lot of deeds for me. I am going to convey my property that way rather than make a will, because there is always a chance for litigation on a will." The witness says he seemed to be afraid that there would be litigation if he made a will, and proposed to distribute all his property before his death.

The witness C. K. King, administrator of the estate, and one of the defendants in this action, testified that he heard J. W. Smith talk about the disposition of his property. He mentions one of these conversations as having occurred in the summer of 1895, perhaps a month or two before J. W. Smith died, and that he told the witness that he had given his property away to his children. The witness did not know whether he said he had given all of it away, but knew that he said most of it, and thought he said that he had given his son C. H. Smith the railroad property; that he stated that he had given the railroad bonds to his son, and that this statement was made about two months before he died.

The witness G. W. Palmanteer, an Oakland banker, was acquainted with J. W. Smith in his lifetime. Smith was a customer of the bank of which the witness was manager. *Palmantier* testified that he had had conversations with J. W. Smith, in which the disposition of his property was referred to. The witness stated that he had called on Smith almost every day while he was sick, and they talked a great deal about the disposition of the property; that J. W. Smith told the witness that he did not own anything in the world; that he had disposed of everything; that he had turned over everything; that he

had made deeds of his property to his daughters, and had turned over the bonds of the California & Nevada Railroad Company to Charles H. Smith, his son. This witness appears to have had intimate relations with the deceased, and to have been familiar with his affairs. The deceased appears to have told the witness several times that he had disposed of his property. One of these conversations at least appears to have been after the execution of the deeds in August, 1895.

From all the foregoing testimony it appears that it was the purpose of J. W. Smith to distribute his estate and give these bonds to the plaintiff, and that he stated before his death that he had made such distribution. This testimony, coupled with the plaintiff's possession of the bonds prior to his father's death, indicates very clearly that prior to the death of J. W. Smith the latter transferred the title and possession of the bonds to his son Charles H. Smith, the plaintiff in this case.

The evidence on the other hand tending to show that these bonds really belonged to the estate of J. W. Smith, is found in the acts of ownership exercised by J. W. Smith during his lifetime, and in the character of the receipt executed by C. H. Smith on November 14, 1895, when he withdrew the bonds from deposit with Abner Doble, and the further fact that C. H. Smith did not present to Doble the formal assignment of the bonds executed by his father on August 14, 1895, as the evidence of his right to their possession. The receipt executed by C. H. Smith shows that he was receiving the bonds for his father, J. W. Smith. But this circumstance is not conclusive. As the

bonds were deposited by J. W. Smith, it was proper that Doble should require, as he did, that the receipt should be executed in the name of J. W. Smith.

The other evidence in the case upon which the defendants rely is the fact that the assignment in question is an object of suspicion. This assignment is in the handwriting of the plaintiff. The signature is that of J. W. Smith. The paper upon which it is written is not ordinary writing paper, but of inferior quality and unusual shape and size. Plaintiff testifies that his father, on the morning of the 14th day of August (the day on which he executed the deeds conveying real estate to his children), dictated to plaintiff the assignment, whereby he conveyed to plaintiff these bonds; that he took this piece of paper and asked plaintiff to write as he should dictate; that some time after the assignment was written, his father went to a desk in the room and signed the document, then giving it back to plaintiff. It seems remarkable that this assignment should have been executed upon a fragment of paper of this character. It appears that there was the usual character of writing paper in the room and on the desk, and no reason is given why paper of that character was not used. Expert testimony has been introduced tending to show that the signature to this assignment was written many years ago, and that the body of the assignment was written some time after the signature, indicating that the plaintiff has obtained his father's signature on a fragment of paper and has written the assignment over it. It is claimed that the

appearance of the paper and the writing tends to support this theory.

It appears further that although the question of ownership of these bonds had been in controversy in the Superior Court of Alameda County and before the master in chancery in this court in another action, the plaintiff has never produced this assignment in evidence until a few days before this trial commenced, when it was produced in an examination of the witness Palmanteer, whose deposition has been read upon this trial. Had this assignment been executed regularly and for the purpose of conveying the title to the bonds, there does not seem to be any reason why it should not have been produced whenever the title to this property was under consideration.

It does appear, however, that in the year 1898 the plaintiff did produce this assignment to W. R. Davis, one of the attorneys for the administrator, C. K. King. At that time a citation had been issued out of the Superior Court of Alameda County, directed to the administrator, requiring him to show cause why the bonds in the possession of the plaintiff should not be inventoried and appraised as part of the estate. The assignment was then considered by the attorneys as evidence that the bonds belonged to the plaintiff, but for some reason not clearly disclosed it was not presented in court in that behalf.

These features of the case certainly tend to raise a doubt as to plaintiff's claim that the bonds were assigned to him under the circumstances related in his testimony. But on the other hand, the defendants have introduced in evidence a letter written by the plaintiff on November

24, 1897, to W. R. Davis, one of the attorneys for the administrator, concerning a claim against the estate of J. W. Smith on account of certain notes executed by J. W. Smith to one Mary F. McSorley for a piece of mining property which Smith had purchased from her. After the death of J. W. Smith a Mr. A. J. McSorley called upon Charles H. Smith concerning the payment of these notes. The latter, as appears from his father, stated to McSorley that he thought the estate would have sufficient property out of which could be realized an amount sufficient to pay his claim in full, and all other claims, and probably leave a surplus. In this letter to Davis, in referring to this claim, the writer says:

“I also said to him at that time that I did not think he need give himself any uneasiness, as I felt that his claim would be paid. I believed so for various reasons. I was in hopes it would not be necessary to call upon any of the estate’s assets to liquidate the claim of McSorley. I thought at that time that I would be able to dispose of some railroad bonds which my father had given me, and, in that event, it was my intention to pay all father’s indebtedness and thereby clean up the whole matter, but at a time when I could have sold the bonds, and was at the point of delivering the same, some matters arose, especially that of litigation, and nothing can be done until this litigation is settled.”

This statement made by Charles H. Smith in 1897 indicates that at that time he had no doubt as to his absolute right to the bonds as a gift from his father, and as this right does not appear to have been brought into question

until more than a year later, there is apparently some credit to be given to this declaration at that time, in connection with the attending circumstances.

It appears further that the relations between the father and son were cordial and to some extent at least confidential. It was the son who, under the direction of his father, drew up the deeds executed on August 14, 1895, conveying property to the other children; and there does not appear to have been any reason why the father at that time should not have distributed to the son such share of the estate as he wished the son to receive; indeed, there would be cause for surprise, if, under the circumstances, this had not been done.

Returning now to the testimony of the witnesses Doble, King, Palmanteer, and Thomas: This testimony is clear and positive that J. W. Smith intended to distribute his property to his children, and did so as to the real estate; that he intended to give the railroad bonds to his son, and the testimony is reasonably certain that he did so. These witnesses are all gentlemen of character, and their testimony has not been impeached or discredited in any way. This evidence cannot be rejected; and, giving it the consideration it is entitled to receive, the court arrives at the conclusion that the plaintiff has, under the law relating to gifts of property, established his ownership of the bonds and his right to recover possession thereof.

A judgment will therefore be entered in favor of the plaintiff.

[Endorsed] Filed March 25, 1901. Southard Hoffman, Clerk. By W. B. Beazley, Deputy Clerk.

*In the Circuit Court of the United States, in and for the Ninth
Judicial Circuit, Northern District of California.*

CHARLES H. SMITH,

Plaintiff,

vs.

CALIFORNIA SAFE DEPOSIT AND

TRUST COMPANY (a Corporation)

and C. K. KING, as Administrator of

the Estate of J. W. SMITH, Deceased,

Defendants.

Bill of Exceptions.

Be it known that on the trial of the above-entitled cause before the Court, sitting without a jury, the jury having been waived by the parties, the following proceedings were had:

Mr. SHURTLEFF.—If your Honor, please, before proceeding with the trial, I wish to ask an order associating with us Mr. Wm. M. Cannon, as one of the attorneys for the defendant King, as administrator.

The COURT.—Very well.

E. E. SHOTWELL, called as a witness for the plaintiff, and being duly sworn, testified as follows:

My name is E. E. Shotwell. I reside in San Francisco, and am secretary of the California Safe Deposit and

Trust Company. I have been such secretary for seven years. I know the plaintiff, Charles H. Smith, and A. A. Grant. Mr. Smith deposited 290 bonds of \$1,000 each with us in escrow, to be delivered to A. A. Grant upon certain conditions. Afterwards Mr. Smith gave us an order for the delivery of 100 bonds.

The order was thereupon produced by the witness and offered and admitted in evidence and marked Plaintiff's Exhibit "A," and said paper reads as follows:

Plaintiff's Exhibit "A."

"Denver, Colorado, March 16, 1900.

"The California Safe Deposit and Trust Co., San Francisco.

"Dear Sirs: Please deliver to A. A. Grant one hundred (100) of the highest numbered bonds of The California and Nevada Railroad Co., now in your possession for safekeeping, under a certain agreement dated June 14th, 1899, a copy of which you have, and oblige,

"Yours very truly,

"C. H. SMITH.

"Received from California Safe Deposit and Trust Company one hundred bonds of the California and Nevada Railroad Company for \$1,000.00 each, numbered 226 250, inclusive, and Nos. 471 545, inclusive.

"A. A. GRANT."

The witness continuing testified: Our bank has the balance of the bonds numbered 190. They are the same bonds that were delivered to us by Charles H. Smith.

Counsel for plaintiff here produced a paper dated August 11th, 1900, which was offered and admitted in evidence and marked Plaintiff's Exhibit "B"; said paper reads as follows:

Plaintiff's Exhibit "B."

"Denver, Colorado, August 11, 1900.

"The California Safe Deposit & Trust Co., San Francisco, California.

"Dear Sirs: You will please deliver to A. A. Grant all of the bonds of the California & Nevada R. R. Co. deposited by me with your Co., and for which receipt was given by you to me dated July 17th, 1899. Mr. Grant will pay your fees in the premises.

"Respectfully yours,

"C. H. SMITH."

Counsel for plaintiff produced a paper dated July 17, 1899, which was offered and admitted in evidence and marked Plaintiff's Exhibit "C"; said paper reads as follows:

Plaintiff's Exhibit "C."

"San Francisco, July 17th, 1899,

"Received from Charles H. Smith, of Denver, two hundred and ninety thousand (\$290,000) dollars of bonds of the California and Nevada Railroad Company, upon the following conditions, viz:

"Upon the payment by A. A. Grant, of Albuquerque, or his assigns, of the sum of five thousand (\$5,000) dollars

on or before June 14th, 1899; and of seven thousand five hundred (\$7,500) dollars on or before August 14th, 1899; and of seven thousand five hundred \$7,500) dollars on or before October 14th, 1899; and of ten thousand (\$10,000) dollars on or before December 14th, 1899, for account of Charles H. Smith, and upon the further delivery of one-fourth (1-4) of the issue of the new bonds of a new corporation to be formed as provided for in a certain agreement of June 14th, 1899, a copy of which is in our possession, and said issue and amount of bonds being subject to the approval of and satisfaction of Charles H. Smith on or before the first day of January, 1900, and also upon the delivery to us of a certificate from said Charles H. Smith to the effect that all the terms of a memorandum of agreement made and entered into on the fourteen day of June, 1899, by and between Charles H. Smith and Angus A. Grant, have been complied with, then said two hundred and ninety thousand (\$290,000) dollars in bonds of the California and Nevada Railroad Company are to be delivered to Angus A. Grant, or his assigns, otherwise said bonds together with any payments made thereon to be delivered to Charles H. Smith, or in lieu of delivery of one-fourth (1-4) of the new issue of bonds, a payment of forty-nine thousand five hundred (\$49,500) dollars to said Charles H. Smith.

“CALIFORNIA SAFE DEPOSIT AND TRUST CO.

“By E. E. S.,

“Secretary.”

The witness continuing testified: The signature at the end of Plaintiff's Exhibit "C" is the signature of Mr. Grant. Mr. Smith made a demand upon us for the bonds. We still hold the bonds. We gave as a reason to Mr. Smith for not delivering the bonds to him at the time he made the demand for them, that Mr. King, the administrator of the estate of J. W. Smith, deceased, had made a demand upon us for those bonds on April 19, 1900. That paper was received by us. I rather think it came through the mail.

Counsel for plaintiff here offered the paper dated June 19, 1900, in evidence, which was admitted and marked Plaintiff's Exhibit "D," and reads as follows:

Plaintiff's Exhibit "D."

"902 Broadway, Oakland, Cal., June 19, 1900.

"Cal. Trust & Safe Deposit Co.

"Dear Sir: As administrator of the estate of the late Capt. J. W. Smith and having been ordered by the Superior Court of Alameda County that 304 bonds of the California and Nevada R. R. Co. claimed by C. H. Smith, the son of the late Capt. J. W. Smith should be inventoried as part of the estate of the said Captain J. W. Smith and appraisers having been appointed by said Court for that purpose, I would ask that should any of said bonds and numbered as follows: 1-2-3-4 and 10 to 42, inclusive, and 54 to 200, inclusive, and 206 to 250, inclu-

sive, and 471 to 545, inclusive, be in your possession that you deliver said bonds to me as such administrator.

"Please answer.

"Yours truly,

"C. K. KING."

(Received Jun. 21, 1900.)

The witness continuing testified: The paper now shown me dated Oakland, California, June 16, 1900, was received by mail at our bank.

Counsel for plaintiff here offered said paper in evidence, which was admitted and marked Plaintiff's Exhibit "E," and reads as follows:

Plaintiff's Exhibit "E."

"Oakland, Cal., June 16, 1900.

"To the Calif. Safe Deposit Co., San Francisco, Cal.

"Dear Sirs: You will please advise me if you have in your possession any bonds of the California & Nevada R. R. Co. reputed to belong to Charles H. Smith.

"As per order of the Superior Court of Alameda County, I, as administrator of the estate of the late Captain J. W. Smith desire to obtain possession of said bonds and have them appraised as part of said estate appraisers having been appointed for that purpose by said Court.

"Yours truly,

"C. K. KING, Administrator,

"902 Broadway, Oakland, Cal."

(Received Jun. 18, 1900.)

The witness continuing testified: A demand for these bonds were made upon us by C. K. King, personally. Mr. Smith was told that we refused to deliver the bonds on account of having received this demand from Mr. King.

A. A. GRANT, called as a witness for plaintiff, being duly sworn, testified as follows:

My name is A. A. Grant. I am stopping in San Francisco. I know the plaintiff. I am the A. A. Grant of whom the witness has just testified as having gone to the California Safe Deposit and Trust Company with certain bonds of the California and Nevada Railroad Company. At the time I went there Charles H. Smith had the bonds in his possession. Subsequent to the delivery of these bonds I gave the California Safe Deposit and Trust Company directions to deliver the last 190 bonds which they *not have* to Mr. Smith. As to the value of the 190 bonds on the 18th day of September, 1900, I could not fix any true value of them. I should judge they were worth 25 per cent of the face value. I am familiar with the property and have been for many years. By the property I mean the railroad which was given to secure the bonds. I have had a few of these bonds since the last issue. I keep my mind on the property of course. When I say it is hard to fix the value of the property I mean that if it was put up at sale it is a question what it would bring. It would depend upon how it was handled. If the railroad was put up for sale, if conditions were not favorable it might not bring much, otherwise it might bring more. You cannot put an exact value on a thing of that kind.

Cross-Examination.

I purchased some of these bonds recently. I paid \$65,000 for 290 bonds. Those are the bonds in controversy. I have practically paid for them. They are nearly all paid up for. I have paid \$51,000 on them. These are the 290 bonds in controversy. Recently I brought suit in this court to recover these precise bonds. As to the value I have placed upon the bonds of 25 per cent of their face value there can be no certainty about that in view of the fact that the railroad is in litigation and in the hands of a receiver, that receiver certificates are outstanding and there is an uncertainty as to what the property will bring if sold. The value is dependent upon all these uncertainties.

Redirect Examination.

I had a contract with Mr. Smith for the purchase of these bonds prior to the agreement under which the deposit in escrow was made. One hundred of the bonds were delivered to me under the agreement with Mr. Charles Smith. It was in pursuance of that agreement that the bonds were delivered to the California Safe Deposit and Trust Company. I made a demand through my attorneys on the California Safe Deposit and Trust Company for those bonds. In compliance with the demand I received 100 of them. I subsequently made a demand for the last \$190,000 of bonds. I did not get them. I understand the administrator, Mr. King put in an objection, claimed the bonds for the estate.

Counsel for plaintiff thereupon introduced in evidence a paper dated September 13, 1900, addressed to the California Safe Deposit and Trust Company, which was admitted and marked Plaintiff's Exhibit "F," and is as follows:

Plaintiff's Exhibit "F."

"September 13th, 1900.

"To the California Safe Deposit & Trust Co., San Francisco, Cala.

"Dear Sirs: Having refused to deliver to A. A. Grant, one hundred and ninety (190) bonds of the California and Nevada Railroad Company of the face value of one thousand dollars each, numbered from 20 to 42, inclusive, 54 to 200, inclusive, and 206 to 225, inclusive, deposited by me with your company for which receipt was given by you to me dated July 17th, 1899, pursuant to my request of August 11th, 1900.

"Now then, A. A. Grant consenting to this my request, I hereby demand from you that you return to me the aforesaid bonds.

"Respectfully,

"CHARLES H. SMITH.

"Witness: HENRY M. PORTER."

"September 13th, 1900.

"To the California Safe Deposit & Trust Co., San Francisco, Cala.

"Dear Sirs: Referring to the above request of C. H. Smith that you deliver to him the bonds of the California and Nevada Railroad Co. deposited with you and re-

accepted for by you July 17th, 1899, I request that you deliver the same to Charles H. Smith as demanded in the above demands.

“Respectfully yours,

“A. A. GRANT.”

The witness continuing testified: I paid \$51,000 on the agreement. I paid no more money because some objections were raised by the administrator as to the title of the bonds. I had no further objections. If I could not get possession of them I naturally withdrew from paying. There is \$14,000 due under our agreement, two \$7,000 payments.

CHARLES H. SMITH, the plaintiff, called as a witness in his own behalf, being duly sworn, testified as follows:

I am the plaintiff in this action and on the 28th day of September, 1900, was a citizen of Colorado.

Plaintiff rests.

J. S. EMERY, called as a witness for defendant King, being duly sworn, testified as follows:

I know the J. W. Smith of whose estate C. K. King, the defendant here, is the administrator. He was the father of Charles H. Smith, the plaintiff in this action. I know the one hundred and ninety bonds of the California and Nevada Railroad Company that are involved in this suit. I knew J. W. Smith about fifteen years and on and before the 15th day of March, 1893. It was twenty years ago, I think, when he came here, and over. I knew him shortly after he arrived in this state.

Q. I show you now, Mr. Emery, a memorandum of agreement and option dated the 15th day of March, 1893, and purporting to have been signed by J. W. Smith and J. S. Emery, yourself. Have you ever seen that document before?

A. Yes, I have seen that—that is my signature to that document, and that is the signature of J. W. Smith. The signature you now show me on the same instrument is the signature of Abner Doble.

Said document was here offered and admitted in evidence and marked Defendant's Exhibit No. 3, and in substance reads as follows:

Defendants' Exhibit No. 3.

“MEMORANDUM OF AGREEMENT AND OPTION.

“Made in triplicate this 15th day of March, 1893, by and between J. W. Smith of the city of Oakland, State of California, party of the first part, and J. S. Emery, of the same place, party of the second part:

“Witnesseth, that the party of the first part for and in consideration of the sum of \$6,384 to him in hand paid by the party of the second part, the receipt of which is hereby acknowledged, does hereby give party of the second part, his heirs or assigns, an option to purchase 304 of the first mortgage bonds of the California & Nevada R. R. Co., a California corporation, for the sum of \$212,800, up to and including September 15, 1893.

“Providing, however, that if the party of the second part, his heirs or assigns, so elect, this option will be extended for a second six months by the tender and pay-

ment of an additional \$6,384 to party of first part thereafter on September 15th, 1893. Time, however, mentioned herein is the essence of this contract.

“On the execution of this contract and the payment of \$6,384 the party of the first part will deposit with Abner Doble of the city and county of San Francisco, said 304 bonds hereinbefore mentioned to be held in escrow by said Abner Doble and to be kept in the safe deposit box rented for said purpose by parties hereto in the First National Bank. Said bonds to be delivered by said Abner Doble to J. S. Emery or his assigns if said J. S. Emery or his assigns shall comply with the terms and conditions of this agreement and option, but should said Emery or his assigns fail to make the payments or any one of them at the time specified, then on demand of said J. W. Smith or his legal representative, said Abner Doble shall deliver said 304 bonds to the said J. W. Smith, or his legal representative, and all payments theretofore made by party of the second part shall be forfeited as liquidated damages.

“In witness whereof, the parties have hereunto set their hands and seals in triplicate the day and year first above written.

“J. W. SMITH. [Seal]

“J. S. EMERY. [Seal.]

“Witness:

“H. L. SIMON.

“JOS. A. MURPHY.

“Abner Doble of San Francisco, California, hereby accepts the agreement hereinbefore set forth and signed by J. W. Smith and J. S. Emery, together with the 304 first mortgage bonds of the California and Nevada Railroad Company therein mentioned and agrees to deliver the same to said J. S. Emery, his heirs or assigns, if he shall comply with the stipulations herein contained, otherwise to return said bonds to J. W. Smith.

“Dated this 15th day of March, 1893.

“ABNER DOBLE.”

The witness continuing, testified:

Q. I now show you a memorandum of agreement and option, dated the 24th day of October, 1893, and purporting to have been signed by J. W. Smith and F. M. Smith, and ask if you have seen that document before, and if you recognize the signatures of J. W. Smith and F. M. Smith?

A. Yes, sir, I do, and those are the signatures of the parties. The signatures to the right on the reverse page purporting to have been signed by J. W. Smith and F. M. Smith by Mr. Clough, his attorney in fact, were written by the persons whose names are there. I know all of their signatures. On the last page of this agreement appears a writing dated the 25th day of October, 1893, purporting to have been signed by Abner Doble That is Abner Doble's signature.

Said documents were thereupon admitted in evidence and marked Defendant's Exhibit No. 4, and in substance read as follows:

Defendants' Exhibit No. 4.

"Memorandum of agreement and option made October 24, 1893, between J. W. Smith, first party and F. M. Smith, second party, witnesseth: That first party for and in consideration of the sum of \$12,220.70 to him in hand paid by two promissory notes aggregating said amounts, one of which is payable in six months and the other in twelve months, and both bearing six per cent interest. As additional consideration second party agrees to pay a monthly rental of \$100 for a portion of block in Emeryville and also \$366 cash additional for back rent, and in consideration of said cash and said two promissory notes first party gives second party an option to purchase 304 bonds of the California & Nevada Railroad Company for the sum of \$212,000, payable at any time within one year from date hereof. If second party has fully complied with the part of this contract and desires that at the end of one year an extension, first party agrees to extend the option six or twelve months longer at the same price and on the same conditions. Time to be considered the essence of the contract. First party agrees to deposit said 304 bonds with Abner Doble, the said bonds to be kept by Abner Doble in the safe deposit box to be rented for said purpose by parties hereto, each paying half the box rent. If second party complies with the conditions of the agreement the bonds shall be delivered to him. Otherwise the bonds to be returned to first party on demand of J. W. Smith or his legal representatives. All payments heretofore made by second party shall be forfeited as

liquidated damages if second party fails to comply with the terms of the option.

“J. W. SMITH. [Seal]

“F. M. SMITH. [Seal]

“Witness:

“ALTON H. CLOUGH.”

(On reverse page appears:)

“All of the conditions and terms of this contract having been fully complied with, the parties hereto hereby extend said contract and option twelve months from this twenty-fourth day of October, A. D. 1894, at the same price and on the same conditions specified therein.

“J. W. SMITH.

“F. M. SMITH.

“By ALTON H. CLOUGH,

“His Attorney In Fact.”

(On last page of agreement appears):

“I, Abner Doble, of San Francisco, California, hereby accepts the agreement hereinbefore set forth and signed by J. W. Smith and F. M. Smith, both of Oakland City, Alameda county, California, together with three hundred and four (304) first mortgage bonds of the California & Nevada Railroad Company therein mentioned; and agree to deliver the same to said F. M. Smith, his heirs or assigns, if he shall comply with all the stipulations therein contained, otherwise to return the said bonds to said J. W. Smith or his legal representatives.

“Dated the twenty-fifth day of October, 1893.

“ABNER DOBLE.”

The witness continuing testified:

Pursuant to the agreements just shown to me the bonds were placed in a box in the safe deposit under the First National Bank in a vault. I rented the box to deposit these bonds in under the escrow agreement. They were deposited in the name of Abner Doble. The bonds were in the possession of the company when they were issued and they were brought there to the office. I have seen all the bonds. They were given by the California and Nevada Railroad Company to Captain J. W. Smith for payment for work he had done on the road. At the time of making this agreement J. W. Smith still had possession of these bonds. He brought them forward and we put them in the box. They remained until Abner Doble turned them over to Charles H. Smith. I have seen them in the box several times. We went to the box there to cut coupons from them, I think. I cannot say how long before J. W. Smith died I saw the bonds there the last time. The safe deposit box was surrendered the day before Captain Smith died. He died November 15, 1895. I rented the box and used to pay the rent and then I would go and collect it, one-half from F. M. Smith and the other half from J. W. Smith. It was rented three years altogether, I think, or two and one-half years, or something like that. I have forgotten. I was well acquainted with J. W. Smith in his lifetime and for some time previous to his death had seen him very frequently. He had his office next door to my house and used to be there every day. For say six months prior to his death, I had seen him probably once a week or

oftener. I remember of the time of his becoming ill in his last sickness. I saw him three or four days before his death and prior to that time had seen him frequently for twenty years or so.

Q. State whether or not, in your opinion, Mr. J. W. Smith at the time you saw him last, two or three days before his death, was or was not of sound mind?

A. He was a very sick man and a prejudiced man. He would not have a doctor. I wanted him to have a physician, and he would not have one. He believed in Christian Science, and said it is just as a person believes, if he believes it won't hurt him to cut his arm off, it won't hurt him. Those were his very expressions as he lay there on the bed and didn't seem to realize his condition at all. He was in bed at that time. He was certainly a sick man; he appeared so. His looks showed it. He believed in Christian Science, and he wrote me letters to have certain believers in that come to see a daughter of mine who was very sick, to which I did not pay any attention. The writing of this letter does have reference to two or three days before his death. It was before that. I have told you he was a very sick man lying there, and his whole appearance indicated it. He had been a believer in Christian Science for, I guess, four or five years. He used to talk to me a great deal about it. I wanted him to have a physician and to get a physician to come in there and he would not have it. He was of sound mind always when he was well. It may have been four days or a week before his death the last time I saw him.

Q. Just confine yourself to the last interview there and as to what his condition was at that time?

A. His condition was, he was lying there and he was not able to sit up; lying in bed. At this time he was not of sound mind in my opinion. I think a man of sound mind, as sick as he was, would take advice of friends that were well and have a physician to attend to him. I did not converse with him on general topics at that last interview. I talked more on his condition than anything else. He was very sick. He had lost his strength a good deal, and his appetite had gone too, I guess. His looks indicated he was a very sick man.

Cross-Examination.

The last time I saw the bonds they were in that box at the safe deposit. They have a safe deposit vault under the National Bank on the corner of Bush and Sansome streets. I went there once with Captain Smith to cut coupons off from them. That was some time after they were put in there, but I can't tell you how long. I know nothing of my own knowledge as to how or by whom the bonds were taken out of that box. I don't think Captain Smith was sick to be in bed more than two or three weeks. He was in his room and would walk out occasionally. He was quite a Bible student and a man of considerable reading and learning, and of bright active mind. I think he was about eighty years old when he died—seventy-nine or eighty. He did not believe that if you cut a man's arm off that it would give him pain, if he only thought it would not; he said it was

all in the imagination. I don't know that he was clear minded when he died, he might have been clear but he was a very sick man. So far as I know, no physician attended him at all, but I understood there was one came afterwards. I don't know the nature of his disease. The last time I was there I had a conversation with him, and he recognized me when I went there. I asked him why he did not have a physician—if he would not have one. He had a Mrs. Somebody there, some woman who was doing something. He did not talk very much; he was very weak. He refused to have a physician.

Redirect Examination.

He did not talk much at that time. He was very weak; he could not talk. I stopped there probably half an hour or may be an hour. I could not tell you how many times he spoke during that time.

Q. Did he speak other than when spoken to directly?

A. Not very much; he was in a good deal of pain.

J. J. SCRIVNER, called as a witness for defendant King, being duly sworn, testified as follows:

I knew J. W. Smith in his lifetime. I knew that there were 304 or more bonds issued to J. W. Smith. If you would give me the numbers of the bonds I could probably identify them.

The COURT.—Numbers 20 to 42, inclusive, 54 to 200, inclusive, and 206 to 225, inclusive.

Mr. CANNON.—Q. And being dated on the 10th day of April, 1884?

A. Yes, sir, those bonds were issued to J. W. Smith. And delivered to him.

T. C. JUDKINS, called as a witness for defendant King, and being duly sworn, testified as follows:

Q. Mr. Judkins, I show you a paper headed "Abner Doble, Company, Importer, Dealer and Manufacturer in Iron, Steel and Metals," and ask you if you recognize that document.

A. Yes, sir, I do. This is a copy of a receipt, the original of which was introduced by myself, representing certain defendants in a hearing before Judge Heacock, master in chancery, in the case of Central Trust Company vs. California and Nevada Railroad Co. et al. The original was produced and put in evidence, and, at my request, the master permitted a copy to be substituted for the original and I took the original. I have had the original in my possession up to about ten days ago, but I have searched diligently since then and have not been able to find it. It is my habit to take home papers on Saturday evening and run over the papers Sunday morning, and, knowing this matter was coming up, I remember seeing the original among the other papers, and whether I took it from them and mislaid it there or at the office, I am unable to say. I have made a diligent search for that paper. The paper shown me and which I now hold is a copy that was left with the master in place of the original. Both documents were left with the master, and that is the master's exhibit mark, his own mark on the back of it. After the copy was compared the master handed it back to me;

probably it was two or three days after when I went back after it. I am well acquainted with Charles H. Smith. I have known him about a year and a half and know his handwriting. I have had correspondence with him and have seen his handwriting frequently. I know his signature. The words "J. W. Smith, by C. H. Smith," at the end of the original receipt were in his handwriting.

(Counsel for defendants thereupon offered the said document in evidence.)

On cross-examination by plaintiff's counsel, the witness testified:

I keep exhibits in my desk. I have a roller-top desk and those exhibits were in a small box in which the powers of attorney from the heirs were kept. This exhibit was kept there most all of the time. I saw it a week ago—last Saturday in my office. I was sitting at my desk where I usually sit. The paper was in front of me on my desk. Whether I put it among the papers that I took home with me or whether I put it among the other papers on the desk, I know not. I have never seen it since that hour. I did not miss any other papers, and I regarded it as one of the most important documents there was among the papers there.

Q. Can you account for the fact for this one being gone and none of the others.

A. In general, I think it was because I was too careful about it. I remember of thinking, as I took the papers home, whether or not, knowing it would come up, it was safe or unsafe to take it in my valise. I gen-

erally take a small valise with a large number of papers home, and I questioned in my mind about the advisability of taking it home. My intention was, I think, not to take it; I had the copy which I had in my office, and I took the copy home with me, as there was no special necessity of having the original. After that hour, late on Saturday, at 1 o'clock, I have not seen the original.

Counsel for defendants thereupon renewed their offer of the document in evidence, and it was thereupon admitted in evidence and marked Defendants' Exhibit No. 5, and is as follows:

Defendants' Exhibit No. 5,

"THE ABNER DOBLE COMPANY.

**"Importer, Dealer and Manufacturer in Iron, Steel and
Metals,**

"13 and 15 Fremont Street, San Francisco, Cal.

"San Francisco, November 14, 1895.

"Received from Abner Doble two hundred and twenty-nine (229) bonds of the California & Nevada Railroad Company, which with the seventy-five (75) bonds of said company ordered from New York, will make three hundred and four (304) bonds of said company—said 304 bonds having been left by J. W. Smith with said Doble as trustee.

"J. W. SMITH,

"By C. H. Smith."

Later in the trial the original document was found by Mr. Judkins and offered and admitted in evidence and marked Defendant's Exhibit No. 21, and is in the words and figures above set forth.

C. K. KING, the defendant, called as a witness in his own behalf, and being duly sworn testified as follows:

I am one of the defendants in this action and am the administrator of the estate of J. W. Smith, deceased. I knew J. W. Smith in his lifetime for ten or twelve years. I was employed by him. Within six months before his death I saw him as often as perhaps once every two days and part of the time once every day and sometimes twice a day. I know Charles H. Smith, the plaintiff. I remember the time of J. W. Smith's death. I was not there when he died. He died at Mrs. Stewart's rooming-house on 13th street in Oakland, between Broadway and Franklin. Charles H. Smith arrived in Oakland shortly previous to J. W. Smith's death, maybe three or four days before, or something like that. He came from Denver. Between the time of Charles H. Smith's arrival and J. W. Smith's death, I should say I saw J. W. Smith every day. He was a sick man lying on the bed. He could not get up at that time. I had no conversation with him for two or three days previous to his death. He did not seem to want to talk to anyone. I think he recognized his son when he came and said "Charlie," or something like that. I did not hear him talk to him at all, but for two days anyhow before his death, he lay on the bed with a handkerchief over his eyes whenever I was there, and didn't seem to want to talk. I had no

conversation with him. I think I said to him when his son arrived, "Here is Charlie come to see you," or something like that. That is the only thing; he never answered me. I had been with him for some months previous to that; that is, not regularly. I was a friend of his and he wanted me to come in and attend to him, and when I went down to business in the morning I called in. I am a real estate agent. I had been accustomed to calling in upon him mornings and evenings as well. Mornings when I went down and evenings when I went home. Sometimes I would remain only a few moments, and sometimes half an hour. When I first commenced calling upon him he was moving about. He took his meals at the table in his room, and went from the bed to the table with the aid of a chair. That was about six months before his death. I should judge he was sick five or six months. For four or five months he would get to the table by the use of a chair. He was confined absolutely to his bed about a couple of weeks, or a week, not so long as a couple of weeks. The last time I had any conversation with him he talked to me rationally the same as he always did. He never at any time before his death talked to me in an irrational manner. For three or four days before his death he did not seem to want to talk to anyone, and I did not bother him. He had a man nurse there. So far as I know, he was of sound mind, I could not say he was of unsound mind at all. No part of the conversation I had with him indicated an irrational statement. I could not judge whether he was in a stupor or not. I went several times

into the room where he lay on the bed with a wet handkerchief over his eyes, and I saw that he was either sleeping or perhaps did not want to be disturbed, and I spoke to his nurse and I then went out without saying anything to him many times. I do not think I spoke to him and received an answer within two days before his death. I would sometimes go into the room, and he would be lying there with a handkerchief over his face. I noticed that several times, and I made up my mind that he was failing and was a very sick man and would not last long. I did not see him converse with anybody within two or three days before his death. I did not see him speak to anybody or answer anybody's questions. So far as I know, I never saw Mr. Smith engage in talking with anybody or answer questions of anybody after Charles H. Smith came there except the time he said "Charlie."

Cross-Examination.

I was there only a small portion of the time after Charles H. Smith came. I may not have gone in every day and I may. Maybe there was a day that I did not call at all, or two days, I do not know. I do not remember of being fifteen minutes at a time after Charlie came. I talked with the old gentleman in his lifetime about his affairs.

CHARLES H. SMITH, the plaintiff, called as a witness for defendant King, and being duly sworn, testified as follows:

I am the plaintiff in this action. I think I arrived in Oakland about five days before my father died. That would be on or about the tenth. I must have left Denver two days previous to that. I left Denver on the afternoon of November 9, 1895. That would bring me here on the evening of the 11th about 6 o'clock, or sometime in the afternoon. From the time of my arrival in Oakland up to the time of my father's death, I was with him most of the time.

Mrs. WILLIAM STEWART, called as a witness for defendant King, and being duly sworn, testified as follows:

I reside at 408 13th street, Oakland, and have resided there seventeen years. I knew J. W. Smith in his lifetime, and had known him about seven years. I had know him at the home of my mother in law, Mrs. Mary Stewart. He lived there and died there. I knew him well for a few months immediately preceding his death and saw him frequently. I brought him his meals for two months when he first took to his bed; then I went away for two months and returned. My mother took care of him then. I returned the 1st of November; he died on the 15th. I was away two months prior to the first of November. He was taken ill on the 15th of June, 1895. Between that time and the time I went away I took him his meals. He had throat trouble. He seemed to be bothered a good deal with swallowing. He did not complain, but seemed unable to assist himself. He was not able to go about the house unassisted. He had a cane or a chair from his bed to his table in the same

room; that was about all. He appeared to be very weak bodily. That condition seemed to be growing worse up to the time I went away. I do not know of his having left his room after being taken ill on the 15th of June, up to the time I went away. When I returned I found him very poorly, in bed. After that he never to my knowledge remained up. Mr. Cunningham took charge of him. I then did not enter only to visit or with mother. After that I entered the room once a day, sometimes twice. Not oftener. Not unless I went to bring something to the door or to step in. I conversed with him a little between the first of November and the 15th. He did not seem to talk so much as before. He seemed very helpless. The nurse had to assist him and also his son after that. He grew weaker each day and remained in bed. His head was placed to the door at the foot of the bed, near the very edge of the bed. That was the way he seemed to fix himself before he got unable to help himself. He never said anything about that change that I know of. He was never changed back. The last conversation I had with him was on the first day of November, when I returned. I had quite a little talk with him then. After that I would just ask him how he felt and how he was getting along. Sometimes he would say about the same. I do not think he spoke anything in the last four days. He seemed to be unconscious. I did not speak to him. I saw he was very quiet. I do not think the last four days he was very conscious. He did not appear to be conscious of his surroundings and people who were in the room, in the last two days. No, sir; he was not conscious during the last two days.

Cross-Examination.

I was at my mother's residence on June 15th. I know that was the day that Mr. J. W. Smith took sick because he called me to get him something to eat. My mother was away and it was on Sunday. I was very busy and had charge of the house while she was away. I know it was five months from the day he went to bed that he died, on the 15th. He said he was unable to get something to eat and would I bring him something. I said yes. From that time I furnished meals to him or my mother in law did until I went away. During that time he was alone, had no attendant and kept to his room. He seemed to be troubled with his throat. I returned on the 1st of November, and some one was taking care of him. I known who that person was, but do not know how he came to be there. I had a conversation with J. W. Smith. He asked me if I had a pleasant trip. I told him I had. He seemed to be pleased and seemed to comprehend the question fully, and asked me the particular parts of the country south where I was. From that time I had occasion to go to his room only when I brought some fresh water or if mother sent me with something. I had very little occasion to go there by reason of the fact that he had an attendant. I do not think the attendant was quite two weeks with him—in the neighborhood of two weeks. He went away as soon as Mr. Smith died. After the conversation when I returned I always asked him how he felt, and he would say about the same. Along the last few days he got quieter and seemed to be drowsy. I made no effort to rouse

him—there were others in the room. When I went into the room he would apparently be asleep or quiet. I never heard any people make any effort to talk to him during the last two days. I made no effort to talk to him—he was in a stupor. He was not able to converse with people because he had not spoken for a few days before. I went in and looked at him. He did not recognize any one seemingly in his room the day before he died. The second day prior to his death I was in his room probably ten minutes—I was in once ten minutes. Mother asked me to come up and see him if I wanted to see him; she thought he was dying. I went up to see him on that statement—had no other business in the room. He was not able to speak. He did not seem to recognize me at all. I did not speak to him, I spoke to mother. Mother and I talked and stood by the side of him. No one spoke to him while I was there. The day of his death I don't think I was longer there at any time than ten minutes. I did not sit down. The last time I was there about ten minutes, never longer. I heard no one speak to him that day because he was dying. I did not speak to him. His son was not there. James Cunningham and Mrs. Stewart, my mother in law, were present. No one else. That was on the last day. I was not there when he died. He died about three hours afterwards, I guess. What I have stated is all that I know which leads me to believe he was unconscious.

Redirect Examination.

Q. Was there anything in the illness of your baby which connected or fixed this date in your mind?

A. Yes, sir; my baby was sick. The captain thought a great deal of the baby and said she was not sick at all. She had spine trouble, and I went away for her health. She died ten days after he died. She died on the twenty-fifth and he died on the fifteenth. He was taken sick in June just before he was taken sick, about the first of June. Captain Smith died in the forenoon of the fifteenth of November, I think it was between ten and eleven o'clock—in that neighborhood.

ABNER DOBLE called as a witness for defendant King, and being duly sworn testified as follows:

I live in Oakland. I knew J. W. Smith in his lifetime. I knew him for a number of years but I don't remember how many—four or five years. I was a director of the California and Nevada Railroad Company. I remember 304 bonds of that railroad which were delivered to Capt. J. W. Smith in his lifetime. I remember of those bonds having been placed in escrow pursuant to certain escrow agreements between J. W. Smith and J. S. Emery in the first place and F. M. Smith afterwards. These bonds were placed with me. I took possession of part of them. Some of them were in New York and were not brought out here. I cannot call to mind exactly how many of them were in New York. It was less than one hundred. I don't remember now. I had an order for the bonds.

They were in New York. Those bonds that were here I took possession of and put in the safe deposit.

Q. And the order on the Central Trust Company for the bonds. Did you take charge of that also?

A. I think I did, but I don't call it to my mind. I placed the bonds in the Safe Deposit Company at the corner of Sansome and Bush streets.

Q. The First National Bank? A. Yes, sir.

I cannot call to mind how long those bonds remained in my possession or in the safe deposit vault. They remained there for sometime, though.

Q. Do you remember when Captain J. W. Smith died?

A. Yes, sir.

Q. With reference to the time of the option in the agreement, state whether or not they remained in your possession until after the last extension on that agreement expired?

A. I do not remember. I do not call to mind. The agreement would be the best evidence. I do not know.

Q. I show you now an option contract being Defendant King's Exhibit No. 3 and a receipt at the end of it and ask you to examine that with particular reference to the date (handing)? You have examined that?

A. Yes, sir, I notice my receipt there.

Q. I show you now a receipt attached to Defendant King's Exhibit No. 4, and ask you to examine that (handing.) A. Yes, sir, that is my signature.

Q. And also an extension there extending the terms of the contract twelve months from the 24th day of October, 1894. Do you remember that?

A. I do not clearly remember that, although it seems like something that I know, but I cannot identify it exactly. I cannot say that these bonds remained in my possession until after the expiration of that option. They remained in my possession until I delivered them to Charles Smith, but I cannot fix the date.

Q. You cannot fix the date at all?

A. No, sir, I cannot fix the dates of that time.

Q. Then they were in your possession, you remember, from the time they were first placed in your possession pursuant to this option contract until you delivered them to Charles H. Smith? A. Yes, sir.

Q. I show you now Mr. Doble what purports to be a copy of a receipt given by Charles H. Smith to you at the time you delivered the bonds to him. It does not purport to be an original receipt but merely a copy of it. Examine it. (Witness was here shown Defendant King's Exhibit No. 21.)

A. Yes, sir, that is correct, I think that is all right.

Q. State as fully as you can the circumstances under which you delivered these bonds to Charles H. Smith. Can you state the circumstances?

A. Nothing more.

Q. What happened between you and Mr. Smith when he came to you if he did come, to get the bonds?

A. When Mr. Smith called for the bonds I delivered them to him. They were in the Safe Deposit Building. We went up to the building and I delivered him the bonds there. Except the seventy-five that were in New York. I think I gave him a receipt for them, to get

them. He got them afterwards. We had to send to New York for the seventy-five bonds.

Q. That was sometime afterwards?

A. I cannot tell.

Q. At the time of the delivery of these bonds by you to Charles H. Smith was any document of any sort presented to you by him?

A. Not that I remember of; only simply a receipt for the bonds.

Q. What do you mean by a "receipt for the bonds"?

A. That he had received the bonds from me.

Q. Is that the receipt a copy of which I have just shown you?

A. Yes, sir; no other paper was produced by him at that time that I remember of.

In answer to questions by the Court, the witness testified:

I knew Mr. Charles H. Smith some two or three years before this time. I knew him as a son of J. W. Smith. I had not seen him very often during that time. He did not come here often, he lived at Denver, and I only saw him a few times. I cannot remember distinctly how I happened to deliver these bonds to Mr. Smith upon this receipt, only I think, my impression is, that Captain J. W. Smith told me that the bonds belonged to Charlie Smith and to give them to him. I had seen J. W. Smith a short time before this occurrence. I was over there to see him a short time before he died. He was sick in bed. I saw him in his room. I did not talk much with him about his business at that time. He was not in a

condition to talk much and I did not talk with him much. What he did talk I cannot recall to mind.

The COURT.—Q. But you say you remember you had some talk with him at that time about these bonds?

A. My impression is that he told me that the bonds belonged to Charlie, and to deliver them to him. I think that is why I did so. I think that conversation was the ground work of my delivering the bonds to his son.

Q. Mr. Doble, you are a business man of experience?

A. I have been in business a good while.

Q. And you are accustomed to transact business in a business way? A. Yes, sir, I try to.

Q. Ordinarily, you would not deliver over property to a person unless the owner should come for it, or should give some order to you, if you were the bailee or holder of the property, would you? A. No, sir.

Q. Now, in this case you had no written order from J. W. Smith? A. None that I know of.

Q. You do not remember ever having seen one?

A. I don't remember ever getting any direct order from him. I delivered them on account of what he told me, that they belonged to his son, and when his son came for them I delivered them.

Q. Do you remember the incident of the son coming for these bonds?

A. Yes, sir. At that time I was in our shop on Fremont street in my office. I don't remember what he said to me on that occasion. I know he and I went to the Safe Deposit and got the bonds and I delivered them to him. I think he gave me the receipt in our office. He

did not bring the receipt with him, it was written out in our office. It was written on the typewriter, one of ours. I think I dictated the receipt. I am not sure because I do not remember the circumstance. I remember it is printed on one of our letter heads, and printed in our office. The details I do not call to mind.

Q. Does the circumstance that it is printed on your letterhead furnish you the information you are now giving, or do you remember it as an independent fact that you dictated the receipt?

A. From looking at the receipt now, and it being on our letterhead, I come to that conclusion.

Q. You do not recall the incident independent of that?

A. I do not clearly, and I have a recollection of it, too. It is not clear. Taking it all together, I take that to be the true condition of it.

Mr. CANNON.—Q. Mr. Doble, I show you the name at the end of the receipt, and call your attention to “J. W. Smith by C. H. Smith.”

A. Yes, sir.

Q. Can you state how that signature happened to be made in that way?

A. The bonds having been delivered to me by Captain J. W. Smith and then delivered to his son C. H. Smith, it was put on as a matter of reference or for recollection, more than anything that I know of. I held the bonds as the bonds of J. W. Smith and Mr. Emery together. That is my recollection concerning it.

The COURT.—Q. Did you ask Mr. Charles Smith as to what his father’s health was at this time?

A. Yes, sir; his father was sick. He was sick. I did not know how bad he was, but he was sick. He died one or two days afterwards. Charles H. Smith had not come to this State a great while from Colorado. He had been here a short while. I learned that at the time of that transaction.

Q. You learned that at the time of this transaction?

A. Yes, sir, Charles Smith was there when I talked with him.

Q. Did he not tell you that his father was very sick and would not live long?

A. He had been sick a good deal, and we would not have been surprised to hear at any time of his passing over. I did not know how bad he was, whether it was more than a slight attack, or not; only that he was a man along in years, and he was dangerously sick.

Mr. CANNON.—How old a man are you?

A. I am seventy-one years old. For the last year or so I have not been very well. I got hurt and I have not been very well. I was hurt by a railroad car. I was knocked down.

Q. Has that effected your memory in any way, do you know?

A. I find that I forget things often; my memory is not as good as it was before I was hurt, still I remember things pretty well, too.

Defendants rest.

Deposition of W. G. Palmanteer.

Deposition of W. G. Palmanteer, of the city of Oakland, county of Alameda, State of California, a witness for plaintiff in rebuttal which had been taken upon stipulation between the parties to this action, and filed with the clerk of this court. Messrs. Galpin & Bolton appearing for plaintiff, and Messrs. Whitworth & Shurtleff, and W. M. Cannon, appearing for defendant C. K. King, administrator of the estate of J. W. Smith, deceased, at the taking of said deposition was then read to the Court, and the said W. G. Palmanteer after being duly sworn testified as follows:

My name is W. G. Palmanteer. My age is 45 years. I live in Oakland. I am in the banking business and manager of the Central Bank of Oakland. I have been connected with the bank since its organization in 1891. I became acquainted with the plaintiff Charles H. Smith in about 1894 or 1895. I know the defendant C. K. King and have known him for about the same time. I knew J. W. Smith in his lifetime. He resided during the latter years of his life in Oakland. I have been acquainted with him since before starting the bank in 1890. He began to do business with this bank along in 1891 or 1892. He used to come in the bank before that; before we opened an account with him. He would talk about his business and finally commenced to change his account from one of the other banks to this one and we gradually got most of his business here. He continued his business with the bank up to the time of his death. I remember

the fact of his death. He must have died about four years or so ago. He used to come in frequently and did a good deal of his writing here. I never had any business relation with him other than—only with the bank. I have had social relations with him, he used to come here and talk hours at a time, come in the evenings and would stay until ten or eleven o'clock at night. He talked to me a great deal about his mines, the California and Nevada Railroad, etc. He talked with me a great deal with reference to his business interests. I don't know that he had any confidential adviser in Oakland. He talked to me a good many times about the disposition of his property. He told me he had deeded to his daughters, and also at one time I remember he said, "Well, I don't own anything in the world; I have disposed of everything" and he told me that he had turned over, made deeds of the property to his daughter, and also that he had turned over the bonds of the California and Nevada Railroad to Charles H. Smith. This was one time when he sent for me and Mr. King. Mr. Smith lives here on 13th street at property owned by Mrs. Stewart. Mr. Smith roomed at this place kept and owned by the Stewarts. I think J. W. Smith only roomed there. I think it was a week or two weeks before J. W. Smith's death when Mr. King came and asked me to go and see Mr. Smith with him. I was busy at that time but went down soon afterwards. Mr. King was there when I arrived, and I think he went out before I did. As near as I can remember, J. W. Smith then said, "I don't own anything in the world. He said he had deeded his property away

and that he also turned over his bonds to C. H. Smith, and he also told me to deliver at one time, whether it was at that time or not, I do not remember, that he told me to deliver his box that he had in the bank to Charles H. Smith, although I had orders before Charles H. Smith came from Denver here, that if he should die—I had a written order here in the bank to deliver the box to Charles H. Smith. And he also told me at that time and after Charles H. Smith came to give the box to the latter, which I did. This was prior to J. W. Smith's death. The only bonds talked about were the California and Nevada bonds. I did not know of his owning any other bonds. Charles H. Smith was here before the summer of 1895, and stayed some little time and returned to Denver. J. W. Smith talked with me about the disposition of his property before and after Charles came. I know of no other deeds having been made other than what J. W. Smith told me. I think J. W. Smith talked with me as many as three times about having disposed of his property. I used to go up there every day or two while the old gentleman was sick. I don't remember how long he was sick, but it was three or four weeks that he did not get out. I think he wasn't well when Charles H. Smith made his first visit here that summer. J. W. Smith mentioned to me that Charlie talked something of moving out here entirely. He said Charlie's interests were large back there and that Charlie's wife did not want to come here and live. At the time of my visit to J. W. Smith when Mr. King came for me, the former said: "Life is uncertain and we don't know how long

we will remain here," or something to that effect, and said he wanted to talk to me. I think I was there the morning he died, or the evening before. The last time I was there he knew me. So far as Mr. Smith's mind was concerned, it was always all right when I saw him. I always considered his mind was clear and he was as bright as a dollar as far as I saw. I never talked with Mr. Smith except that I thought his mind was sound and all right. The box I referred to before was a pretty good-sized tin box, of a dark brown color, and was kept locked. The lettering on the box was "J. W. Smith." J. W. Smith first brought the box to the bank and it remained continuously here until finally taken away. I don't know where the box now is. When I saw it last Charles H. Smith had it. This was when the latter came and got it at the request of his father for me to give it to him. His father requested me to give it to him and when Mr. Smith came here I handed it to him. Charles Smith got the box in his possession before Mr. Smith died. I don't remember how long before, but only a short time. Prior to the death of J. W. Smith Charles had transactions with this bank, having had checks cashed here. Charles H. Smith deposited some money here; it was a collection on Denver, a draft or a check on Denver, I think. The amount was \$2,000 or \$2,500. (Here witness brought in the books of the bank and examined them.) I find from the books that the deposit was made on August 26, 1895, and the amount was \$2,500. It was deposited to the account of C. H. or J. W. Smith. J. W. Smith could check against it. Both J. W. Smith and Charles talked with

me in the Stewart place about this deposit. I told him that he would have to give a check to C. H. Smith and that the money would have to be drawn out before his death or I would consider that it would have to be probated upon. That was after the deposit of \$2,500. J. W. Smith had an open account with the bank before this. The conversation just referred to was in the presence of J. W. and Charles Smith, and I also had a talk with the former when Charles was not present. I think we had a talk with Mr. J. W. Smith when Mr. Smith was out here; that is the time he came when his father died. I don't know that I ever saw any instrument or paper signed by Mr. Smith relating to the disposition of his property. He had a paper here that he had left with me about whom to deliver the box to and anything that I had here, and what he wanted to be done; that is, he wanted to be buried, but just the wording of which I don't recollect. I think I saw some deeds to property, but I never looked over them to my remembrance. J. W. Smith had some in his own hand, but I never looked them over. The old gentleman was sick longer than I first thought; but I think at one time he had some deeds and he said he disposed of it, but I didn't look at the deeds.

Cross-Examination.

I remember that J. W. Smith talked with me two or three times about the disposition of his property. The first conversation was something like two or three weeks before C. H. Smith came from Denver, and also after C. H. Smith came he talked to me about it. I cannot re-

call the date of the first conversation. I know Mr. King came for me some time before Mr. Smith's death. But just how long before I don't know. I don't think the first conversation was not more than a month before his death. Before that he had talked in a minor way to me about the disposition of his property, about his daughters and the different interests, etc. They were not formal conversations and did not impress themselves upon my mind. I think that the first formal conversation occurred within a month of his death. I think that J. W. Smith was up there alone when he first talked to me about it, and the next time Mr. King came, I think, after me. This occurred in his room on 13th street. I don't remember the circumstances of the first conversation, because he didn't call me there. I wasn't there for that purpose; I was there to see how he was. He told me he calculated that Mr. Smith would have the California & Nevada Railroad or the bonds, Mr. C. H. Smith, and I think it was then that he talked to me about giving his daughters some real estate and property, but not as fully as he did when Mr. King came. I cannot recollect the exact language, but as near as I can recollect he calculated that Charles H. Smith had the bonds, or they were his, or they belonged to Charlie, or that he had given them to him already, and I think that he had disposed of them. I wouldn't attempt to state just what he said. I think the next conversation was some couple of weeks before his death, when Mr. King came for me, but it might not have been more than a week. This conversation in part was in the presence of Mr. King. As near as I can state, J. W. Smith said, "Life is uncertain

and we don't know how long we will remain here," or something of that kind, and then he said, "I have made deeds to my property," and in fact, he says in this way, "I don't own anything in the world." He told me that a couple of times and that he had given the bonds of the railroad to Charles H. Smith, and had disposed of his property by deed to some of his daughters, and had given something to another son, I think. As near as I can recollect is, "that he had turned the bonds over; that he had given them to him; that they were turned over to Charles H. Smith." I don't know how long the conversation lasted, but I was up there maybe a half an hour. He talked a good deal more, but he was a man of very few words. If you ask him a question his mouth would close like a clam. He would not talk anything in the way of a suggestion from you. I think I had a third conversation in his room (with J. W. Smith), only several days before his death. C. H. Smith and J. W. Smith were there then. During the second conversation Charles H. Smith was not in the room. I remember the date of the deposit of the \$2,500 by referring to the books of the bank. Charles and his father had talked with me about the account in the name of C. H. or J. W. Smith. I delivered the tin box to Charles a short time before his father's death. The exact date I cannot say. During the first conversation J. W. Smith was in his bed or lying on the bed. During the second conversation he was lying on the bed. That was his last illness. I think he was bolstered up in bed the last visit I made to him. I know I have been in there a number of times when Mr. King would bolster him up in bed and he would write

that way sitting up in bed. I saw him a number of times when he was writing sitting up in bed. In the presence of C. H. Smith he said, "I don't own a dollar in the world." He told me he had disposed of his property by deed to his daughters, and I think something to his son, and that he had turned over his bonds to Charles. He said, "I have given and turned over my bonds to C. H. Smith." I am not attempting to state the exact language. I was there the day before J. W. Smith died. Charles was there also. I think J. W. Smith knew me the last time I was there, but he didn't have much to say. I think he called me by name, but I would not be sure. Sometimes I would say to him when I would go in, "Well, Captain, how is the boy this morning," and he perhaps would say he didn't know, and perhaps would smile, and perhaps call me by name, but this time I could not just exactly tell. I gathered that he recognized me from the expression of his face, but I could see the last time I saw him that he wasn't going to live long. I think the day or two before he died he closed his eyes a good deal. He always opened his eyes when I went around to him, but you could see he was a man nearing death. He was a very strong man and some of the best things I ever heard a man get off were said by him, and he was a great deal smarter than the boy you are having your lawsuit with. I have had business transactions with C. H. Smith since his father's death. I hold some of the receiver's certificates of the California and Nevada Railroad Company. I think Charlie told me that if the bank took the certificates he would see that we got our money.

I do not remember just what he or Mr. King did say, but my impression was that it was all right, that we would get our money sometime. I think we have \$1,200 or \$1,400 worth of the receiver's certificates.

Redirect Examination.

I was well acquainted with the signature of J. W. Smith in his lifetime, and saw him write his name frequently. I recognize the signature on this paper you hand me as J. W. Smith's signature and the writing of the paper is Charles H. Smith's writing.

The assignment was thereupon produced and offered and admitted in evidence, and marked Plaintiff's Exhibit "G," and said paper reads as follows:

Plaintiff's Exhibit "G."

"Oakland, Cala., August 14th, 1895.

"For value received, I hereby sell, deliver, and assign to C. H. Smith all the bonds which I own of the California & Nevada Railroad Co., being 304 in number, of \$1,000 each, including the order and requisition on the Central Trust Co. for 75 of the said bonds, subject to the option given to F. M. Smith, which I also assign to C. H. Smith.

"J. W. SMITH."

Recross-Examination.

Mr. CANNON.—Q. Did you ever see this document just read in evidence before to-day?

A. No, sir, I never did.

Q. Was it ever in your possession, the possession of the bank?

A. Not to my knowledge.

Q. Did you ever hear of its existence before to-day?

A. I never talked with anybody about it before to-day.

W. R. THOMAS, called as a witness for the plaintiff in rebuttal, and being duly sworn deposes and says: I reside in Oakland, California. I have resided there thirty years. I knew J. W. Smith for twelve years before his death. I saw him off and on up to the time of his death. I think I last saw him the day before he died. I had business transaction with him covering a period from 1888 or 1889 up to the time of his death. We were engaged in mining business together for several years. I had considerable correspondence with him and did considerable writing for him. As far as his handwriting and signature is concerned I am well acquainted with it. I had a great deal of correspondence with him. I visited him after he was taken sick and confined to his room. I may say I was there every other day at least. Sometimes every day during his sickness. He made a statement to me about the disposition of his property—that he had deeded away all his property and disposed of his property, so that in the event of his dying there would be no trouble about his estate to avoid litigation. I was present at the time he acknowledged deeds to quite a number of pieces of property. As notary public I took his acknowledgments. From my observation of Mr. Smith, at the time I saw him after he became sick and was confined to his room, he was, in my opinion, sane. My reasons for saying that he was sane are from the fact that I never knew him to do anything that I considered was insane, to do or say anything that I considered was evidence of insan-

ity. I talked with him on my visits to him. I would remain not less than one-half an hour, I think, at any one time. I have seen him write, and had occasion often to see his signature.

Q. I hand you a paper now marked Plaintiff's Exhibit, "G," and ask if you will examine the signature to that paper (handing). State whether or not in your opinion that is the signature of John W. Smith, deceased.

A. That is his signature. I have a memoranda by which I can fix the date upon which I took the acknowledgments to the deeds. After refreshing my memory from the memoranda I can state upon what date I took those acknowledgments. It was August 14, 1895. At that time J. W. Smith stated that he had made deeds of his property to his children and desired to acknowledge them. He said at that time he was deeding his property to his children and wanted to acknowledge the deeds and for me to put on my seal. He said nothing further at that time in relation to those deeds. He had said something about it prior to that time. He said prior to that time that he was going to deed all of his property before his death, and he said, "I may want you to make out a lot of deeds for me. I am going to deed all of my property away before my death, so as to avoid any litigation hereafter." He said, "I am going to do that rather than make a will, because there is always a chance for litigation on a will." He seemed to be afraid there would be if he made a will, and he proposed to distribute it all before his death.

Cross-Examination.

I did not make out the deeds in question. They were executed in Captain Smith's room, at 408 13th street, Oakland, at Mrs. Stewart's house. The date was August 14, 1895. I could not have remembered the date without looking at this record. It is from the record that I am testifying as far as the date is concerned.

Q. Turn to that record again. I call your attention to the fact that the record you have produced of the entries containing the memoranda of deeds, the Smith deeds, is of a different colored ink from your other memoranda.

A. Yes, sir. I made that record in Captain Smith's room at his desk. I used that same ink during the execution of all those deeds. The ink was on his desk. I took my record-book and seal book with me, and used that ink in drawing the acknowledgments. I think Captain Smith used that ink in signing the deeds. I am not certain whether he used the same ink or not. I think he did. I did not notice particularly if there was any other ink there at that time. It seemed to me a common bottle of ink that I used in all the business transactions at that time. It was at his desk, and the business was done at his desk in that room.

Mr. CANNON.—I offer the memoranda for the purpose of showing the Court. I want the Court to see it particularly with reference to the color of the ink. It was thereupon admitted in evidence and is as follows:

“Oakland, Cala., August 14th, 1895.

“For value received I hereby sell deliver and assign to C. H. Smith all the bonds which I own of the California and Nevada Railroad Company, being three hundred and four in number of \$1,000 each; including order and requisition of the Central Trust Company for 75 of the said bonds, subject to option given to F. M. Smith, which I also assign to C. H. Smith.

“J. W. SMITH.”

The witness continuing testified: During the last few months of Mr. Smith's lifetime I saw him nearly every day from the time he was taken down, confined to his room until his death, that is, once every other day, anyway. At the time he was first confined to his room he was not quite weak. I could not say he became bodily weak a short time afterwards. Sometimes his complaint seemed to be with a severe pain across his back. He was not able to get up and down stairs. He remained in his room. Bodily, he seemed to be pretty well, except this pain. He complained of kidney disease. He complained of a pain across his kidneys, in his back. Sometimes while I was there he would pretend to make an examination of his urine and hold it up to the light. I have seen him do that. I have never seen him take any of his urine in a bottle and let it stand for a couple of days to see the sediment that had settled in it. I had it done myself on my own account. I got the results from the physician who made the test. I think that was in August of the year of his death. At that time Mr. Smith was confined to his bed as a rule—confined to his room. Dur-

ing nearly all of his sickness he was confined to his room. He would lean on the back of a chair and push the chair in front of him when he went over to his desk, or went over to a sofa there was there, where he would rest part of the time. That was the case along during August. Then he gradually got weaker after that as the disease progressed. I think I saw him last the day before his death, and also probably a day or two before that. My recollection is that I was there about every other day. I could not state exactly when I was there prior to the last visit. I should say the second day before that. I could not swear I was there the second or third day. I will not swear it was not three days before that. I could swear it was not to exceed three days before his death and the day before. I did not see Charles H. Smith there the last time I was there. I did not remain more than two or three minutes. I did not attempt to have any conversation with him at that time. He was then in his bed lying down flat. His eyes were closed. I attempted to have no conversation with him at all. I thought he was asleep. At the conversation three days or so prior to that I presume I did have some conversation. I would usually go in and go to the bed. I spoke to him; I remained not to exceed three or four minutes. I spoke to him and took hold of his hand. I was there about two days before that time. In the conversation I testified to having with Mr. Smith as to deeding away his property he said, "I have deeded away my property to my children to avoid litigation and paying lawyers." I think he used those words. That was on the 14th day of August,

when I took the acknowledgments. The other conversation referred to, which occurred prior to that time was, he said he was going to deed away his property to his children. Those are the only two conversations I had with him upon that subject.

Q. You say, Mr. Thomas, that you recognize the signature to that document Plaintiff's Exhibit "G," as being the genuine signature of J. W. Smith?

A. Yes, I call this his signature.

Q. Do you remember any one peculiarity of J. W. Smith's signature now?

A. I simply say that I know his signature as well as I know my own.

Q. Can you state one peculiarity of J. W. Smith's signature?

A. I do not know what you would call a peculiarity. He had a fine signature. He wrote a good signature. He wrote a very plain hand. I know just about how many motions he made to make the signature. I think at the latter part of his signature there was always a sort of flourish you might call it, a scroll line sometimes extending clear around the signature. That was the rule. I do not know, I am sure, whether it was always the invariable rule or not. It was a rule. I suppose it was a characteristic of his signature. I could not say it was invariably the rule. There is that about his signature that I do not think I could be mistaken.

Q. I call your attention to the signature "J. W. Smith," on "Defendant King's Exhibit No. 3," and ask if you find that characteristic of the scroll on that signature (handing).

A. That is his signature.

Q. Is that what you mean by the peculiar scroll at the ending of his signature?

A. Not so much as that. I know that he would always bring his pen around. I do not know exactly the motion he made. I do not think I have seen a signature that had as much of a scroll to it as that had.

Q. You claim to be quite familiar with his signature?

A. Yes, sir. I am quite familiar with his signature.

Q. Look at the signature on "Defendant King's Exhibit No. 4." Did you ever see as much of a scroll as there is on that document (handing)?

A. I do not remember that part of the scroll going over here, from here over (pointing). Still that is Smith's signature.

Q. I turn over to the next page of the same exhibit, and ask if you have ever seen that much of a scroll on his signature?

A. I don't remember ever seeing as much of a scroll over here as there appears to be upon that signature. The lower portion of the scroll I remember that he always brought down the lower portion.

Q. You do not remember on any of these signatures I have shown you, the line above the name?

A. I don't remember of that being a characteristic of his signature. I do recognize the lower part here as being a customary scroll on his signature.

Q. You cannot say whether or not that was a characteristic of his signature?

A. I can swear those are his signatures on these papers.

Q. Have you any signatures of J. W. Smith in your possession written on or about the 14th of August, 1895.

A. No, sir.

Q. Have you any of those deeds in your possession mentioned in evidence here?

A. No, sir.

Q. Have you had any of those deeds in your possession since August 14, 1895?

A. No, sir.

Q. Would you call the straight line after the "h" in Plaintiff's Exhibit "G" and the straight sweep crossing the "t" characteristics of J. W. Smith's signature?

A. No, sir.

Q. You would not?

A. No, sir. I would not.

Q. Did you ever see a signature of J. W. Smith's with those lines on that I have just mentioned?

A. I cannot say whether I have or not.

Q. What is your best judgment about it?

A. My best judgment is that his signature was usually made with a scroll at the bottom.

Q. What single thing is there in the signature before you now in Plaintiff's Exhibit "G" which you consider a characteristic of J. W. Smith's handwriting?

A. All of the letters in the name "J. W." and "Smith," and the way they are run together.

Q. How? Explain a little more in detail.

A. The general appearance satisfied me that it is his handwriting.

Q. Is not the scroll a part of the general appearance?

A. The scroll is not here.

Q. The scroll that you have already described as ac-

comparing the signature, is not that a part of the general appearance?

A. A part of the general appearance of the scroll. The general appearance of those letters are Smith's.

Q. Is not the straight line after the "h" and the cross on the "t" a part of the general appearance of that signature?

A. There could not be a scroll of that nature put on this signature if this was all the paper he had had to write upon at that time.

Q. You are willing to go on record as saying that Mr. Smith could not put a scroll on there, if he had desired are you?

A. There is not room for it. It is a mechanical impossibility.

Q. I am asking you, are you willing to go on record as saying that Mr. Smith could not put a scroll on there if he had desired?

A. I will go on record as saying that Mr. Smith could not have put the usual scroll that appears on his usual signature on this piece of paper now in my hand, unless the paper at the time the writing was made was larger than it is now.

Q. Why do you make the last qualification as to the possibility of the paper being larger than it is now?

A. Because there is no room on the paper below the word "Smith," for the scroll as it usually appears on his signature.

Q. I ask you to place side by side the signatures at the end of the escrow agreement "Defendant King's Exhibit

No. 4" with this and state to the Court in which particular you claim the letters of those two signatures bear the same general characteristics.

A. He commenced the "J" at the upper part of the latter "J" with a downward stroke, and then comes around and connects the "W" with the "S." In other words, he writes the whole thing "J. W. S." without taking his pen off. What I meant by there not being a chance for a scroll was, if he had come around with his usual scroll he would have run off this card if there was no more room on the card. Anyone writing like that would have run off sure.

Q. You have testified to that; go on.

A. That is all there is to it.

Q. I call you attention to the first statement in which you say he commences the "J" with a downward stroke, if in the signature I have just shown you, an admittedly genuine signature, he did not commence his "J" with an up stroke.

A. No, sir.

Q. Do you not see this up stroke (pointing)?

A. Oh, yes, I see that.

Q. Do you find that in the signature in Plaintiff's Exhibit "G"?

A. Well, the general appearance of the letter is the same.

Q. Answer the question.

A. No, sir, I do not find the same little curl there.

Q. In the first downward stroke of the "J" and the second downward stroke of the "J," do you find the parting of the nibs or the heavy appearance of the signature.

the shading, do you find that as it appears in Exhibit "G," an admittedly genuine signature.

A. The letters are not shaded as heavily on this thin paper as they are on the heavy paper.

Q. I call your attention to the loop of the capital "S." Do you find as large a loop in the disputed signature as in the genuine signature?

A. I little difference in the size of the loop.

Q. Does not the whole signature in the disputed signature have a stronger, firmer look than the genuine signature I have just shown you, as though it were made with a stronger and more powerful hand?

A. It looks, as though it were made with a more bold hand, that is, bolder writing.

Q. Did you see him sign the deeds on the 14th day of August, 1895? A. Yes, sir.

Q. He signed these in your presence with the same ink that you used in making the memoranda?

A. I do not know if he used the same ink. He signed the deeds though.

J. J. SCRIVNER a witness called for the plaintiff in rebuttal, and being duly sworn, testified as follows:

Mr. BOLTON.—Q. I hand you a paper dated Oakland, Cal., May 27, 1900, addressed to J. J. Scrivner, Esq. Is that your signature to that paper (handing)?

A. Yes sir. I really cannot call to mind receiving that paper from Mr. Smith. I must have done so. Let me think there a moment. There have been so many papers, that I do not just now recall it to my mind.

That is September 22, 1890. There is no doubt but what that is my signature, and I wrote that cancellation. I think the signature attached to this document is the signature of J. W. Smith. I have no doubt about it whatever, although it is not his usual signature. I have no doubt it is his signature. My best recollection is that I have had that document in my possession, and acted upon it as a genuine document and upon the signature to it, as the genuine signature of J. W. Smith.

Said document was thereupon offered and admitted in evidence and marked Plaintiff's Exhibit "H," and is in substance as follows:

Plaintiff's Exhibit "H."

"Oakland, Cal., May 27th, 1890.

"J. J. Scrivner, Esq.

"Dear Sir: At your request I hereby authorize you to sell all my interest in the California & Nevada Railroad, including bonds, stock, material on hand at date of purchase, one locomotive engine, and a piece of land in Oakland fifty by four hundred and thirty feet, adjoining the Southern Pacific Railroad Company etc.

* * * * *

"In witness whereof I have hereunto set my hand this 27th day of May, 1890.

"J. W. SMITH.

"I have no duplicate copy of above. May 27, '90.

"J. J. SCRIVNER.

"Canceled this June 23d, 1890. J. J. Scrivner."

Mr. BOLTON.—Q. Look at that letter, please (handing). I do not call your attention to it for the purpose of its contents, but for the purpose of looking at it, to see if that is in the handwriting of J. W. Smith.

A. I think it is. Although it is not his usual business signature, I have no doubt but that it was written by him and it is his signature.

Said document was thereupon offered and admitted in evidence and marked Plaintiff's Exhibit "I," and is in substance as follows:

Plaintiff's Exhibit "I."

"Letter dated Oakland, Cal., May 1, 1895, addressed to C. H. Smith (Dear Son), and signed, Your afft. father, J. W. Smith."

Q. I now call your attention to an envelope of September 11, 1885, at the top of it, and ask you if the handwriting upon that envelope and the signature is in your opinion the handwriting of J. W. Smith (handing).

A. I should say it was.

Said document was thereupon admitted in evidence, marked Plaintiff's Exhibit "J," and is in substance as follows:

Plaintiff's Exhibit "J."

"Envelope. Memo. thereon. Dated Sept. 11, '85. Signed J. W. Smith."

Mr. BOLTON.—Q. I hand you a paper marked February 1, 1893, memorandum on the bottom and the signature. State to the Court whether that is the handwriting of J. W. Smith. A. I should say it was.

Said document was thereupon offered and admitted in evidence and marked Plaintiff's Exhibit "K," and is in substance as follows:

Plaintiff's Exhibit "K."

"Letter dated San Francisco Jan. 30, 1893, addressed to Mr. J. W. Smith, Oakland, Cal., and signed by California & Nevada R. R. Co., by E. A. Phelps, Treas. Underneath is a memorandum dated Feb. 1, '93, and signed by J. W. Smith."

Cross-Examination.

Mr. CANNON.—Q. You said something in your testimony about a former business signature of Mr. Smith and a signature of a letter or an ordinary paper. Do you mean to make such a distinction?

A. I do. For many years prior to his death, and since a circumstance that we are all familiar with, connected with this matter, but the date even of the year I cannot locate, when Mr. Smith's signature was forged to a check in the bank here, I believe it must have been about 1883 or 1886, here, and as he explained to me personally, adopted a scroll around it, and afterwards around his name, similar to some of those exhibits.

Q. In the exhibits shown to Mr. Thomas?

A. Yes, sir, and for the purpose, as he said, as I understand and remember it—it was a long time ago—for the purpose of preventing his signature being forged. I do not want to be entirely and absolutely certain about these things; it is too long ago, but in my early acquaintance with Mr. Smith, I think he wrote his straight signa-

ture without any lines of any kind, but latterly, for a number of years to his death, it was his custom, beyond doubt, I think, to accompany his signature with some extra marks of that character. He would use this formal signature with the scroll on his business paper—contracts and the like.

Q. Do you know to what extent he adopted that custom with his letters?

Q. I show you what purports to be a check dated Oakland, Cal., April 2, 1895, on the Central Bank of Oakland, and ask you to examine the signature upon that and state in whose handwriting it is (handing).

A. J. Smith's signature. The scroll I mentioned is there. The scroll was not always uniform, but it appeared in some shape there.

Said document was thereupon offered and admitted in evidence and marked "Defendant's Exhibit No. 6," and is in substance as follows:

Defendants' Exhibit No. 6.

"Check, dated Oakland, Cal., Apl. 2, 1895, on Central Bank of Oakland, in favor of J. J. McSorley for fifty dollars. Signed by J. W. Smith."

Q. I show you now a check dated San Francisco, April 6, 1895, on the London, Paris & American Bank, and ask you whose signature is attached to it (handing).

A. The same. That contains the scroll.

Said document was thereupon offered and admitted in evidence and marked "Defendants' Exhibit 7," and is in substance as follows:

Defendants' Exhibit No. 7.

“Check, dated San Francisco, April 6, 1895, on London, Paris & American Bank, in favor of Miller, Sloss & Scott, for \$99.40. Signed by J. W. Smith.”

Q. I show you a check dated April 8, 1895, on the London, Paris & American Bank and ask you whose signature is attached to it (handing).

A. J. W. Smith's. It contains the scroll.

Said document was offered and admitted in evidence and marked “Defendants' Exhibit No. 8,” and is in substance as follows:

Defendants' Exhibit No. 8.

“Check, dated, San Francisco, April 8th, 1895, on London, Paris & American Bank in favor of Central Bank of Oakland for one thousand dollars. Signed J. W. Smith.”

Q. I show you a check dated San Francisco, May 8, 1895, on the London, Paris & American Bank and ask you whose signature is attached to that (handing).

A. J. W. Smith's. It contains the scroll.

Said document was offered and admitted in evidence, marked “Defendants' Exhibit No. 9,” and is in substance as follows:

Defendants' Exhibit No. 9.

“Check, dated, San Francisco, May 18, 1895, on London, Paris & American Bank in favor of George W. Norton, for \$15.00. Signed by J. W. Smith.”

Q. I show you a check dated San Francisco, May 28, 1895, on the London, Paris & American Bank, and ask you whose signature is attached to that (handing).

A. J. W. Smith's. It contains the scroll.

Said document was offered and admitted in evidence, marked "Defendants' Exhibit No. 10," and is in substance as follows:

Defendants' Exhibit No. 10.

"Check dated May 28, 1895, San Francisco, Cal. on the London, Paris & American Bank, in favor of First National Bank of Oakland for one hundred dollars. Signed by J. W. Smith."

Q. I show you a check dated, San Francisco, Cal., July 30, 1895, on the London, Paris & American Bank, and ask you whose signature is attached to it (handing).

A. I should say that it was Captain Smith's signature.

Said document was offered and admitted in evidence, marked "Defendants' Exhibit No. 11," and is in substance as follows:

Defendants' Exhibit No. 11.

"Check, dated, San Francisco, Cal., July 30, 1895, on the London, Paris & American Bank payable to order of himself, 1st National Bank, for one hundred dollars. Signed by J. W. Smith."

Q. I show you a check, dated Oakland, Cal., August 6, 1895, on the Central Bank, and ask you if that is J. W. Smith's signature attached to it (handing).

A. Yes, sir.

Said document was thereupon offered and admitted in evidence, marked "Defendants' Exhibit No. 12," and is in substance as follows:

Defendants' Exhibit No. 12.

“Check, dated Oakland, Cal., August 6, 1895, on the Central Bank, in favor of J. F. Daniels, Supt., for \$16.00. Signed by J. W. Smith.”

Q. This is the next day after the proposed assignment. I show you a check on the Central Bank, dated August 15, 1895, and ask you if that is his signature (handing).

A. Yes, sir.

Said document was offered and admitted in evidence, marked “Defendants' Exhibit No. 13,” and is as follows:

Defendants' Exhibit No. 13.

“Check, dated Oakland, Cal., August 15, 1895, on the Central Bank of Oakland for \$200. Signed by J. W. Smith.”

Q. I show you a check dated Oakland, Cal., August 15, 1895, on the Central Bank, and ask you if that is J. W. Smith's signature (handing).

A. Yes, sir.

Said document was offered and admitted in evidence, marked Defendants' Exhibit No. 14, and is in substance as follows:

Defendants' Exhibit No. 14.

“Check, dated, Oakland, Cal., August 19, 1895, on the Central Bank in favor of J. J. McSorley for \$69.31. Signed by J. W. Smith.”

Q. I show you a check dated Oakland, Cal., September 2, 1895, on the First National Bank, and ask you if that is J. W. Smith's signature (handing).

A. Yes, sir.

Said document was offered and admitted in evidence, marked Defendants' Exhibit No. 15, and is in substance as follows:

Defendants' Exhibit No. 15.

"Check, dated Oakland, Cal., September 2, 1895, on the First National Bank in favor of Mrs. Mary Stewart, for \$28.75."

Q. I show you a check dated Oakland, California, September 9, 1895, on the First National Bank, and ask you if that is J. W. Smith's signature (handing).

A. Yes, sir.

Said document was offered and admitted in evidence, marked Defendants' Exhibit No. 16, and is in substance as follows:

Defendants' Exhibit No. 16.

"Check, dated Oakland, Cal., September 9, 1895, on the First National Bank, in favor of W. R. Thomas, for one hundred dollars. Signed by J. W. Smith."

Q. I show you a check dated Oakland, California, October 2, 1895, on the First National Bank, and ask you if that is J. W. Smith's signature (handing).

A. Yes, sir.

Said document was thereupon offered and admitted in evidence, marked Defendants' Exhibit No. 17, and is in substance as follows:

Defendants' Exhibit No. 17.

"Check, dated Oakland, Cal., October 2, 1895, on the First National Bank, in favor of J. W. Thomas. Signed by J. W. Smith."

Q. I show you a letter dated Oakland, California, March 7, 1893, purporting to be written to Mr. E. A. Phelps, and ask you if that is J. W. Smith's signature to that letter (handing). A. Yes, sir.

Said document was thereupon offered and admitted in evidence, marked Defendants' Exhibit No. 18, and is in substance as follows:

Defendants' Exhibit No. 18.

"Letter, dated Oakland, California, March 7, 1893, addressed to Mr. E. A. Phelps, Secretary & Treasurer California Railroad Company, and signed J. W. Smith."

Q. I show you what purports to be a certificate of stock in the Wilderness Gold Mining Company, dated October 3, 1891, and ask you if that is the signature of J. W. Smith as president (handing). A. Yes, sir.

Said document was offered and admitted in evidence, marked Defendants' Exhibit No. 19, and is in substance as follows:

Defendants' Exhibit No. 19.

"Certificate of stock No. 220, dated Oct. 3, 1891, for 100 shares of The Wilderness Gold Mining Company. Signed J. W. Smith, resident, countersigned C. K. King, Secretary."

Q. I show you another certificate, certificate No. 217 of the same company, and ask you if that is his signature to that one—dated October 23, 1891 (handing).

A. Yes, sir.

Said document was offered and admitted in evidence, marked Defendants' Exhibit No. 20, and is in substance as follows:

Defendants' Exhibit No. 20.

“Certificate of Stock No. 217, dated October 3, 1891, for 100 shares of The Wilderness Gold Mining Company. Favor of J. W. Smith.”

WILLIAM R. DAVIS, a witness called for the plaintiff in rebuttal, and being duly sworn, testified as follows:

I reside in Oakland, California. My occupation is attorney at law.

Q. I call your attention to Plaintiff's Exhibit “G,” and ask you if you ever saw that paper before.

A. (After examining Exhibit “G.”) I have seen it before. I cannot fix the date as a matter of dates, but my best recollection is that I saw it first in 1898 or the early part of 1899. There was a citation pending in the Superior Court of Alameda County, a citation of C. K. King, as administrator of the estate of J. W. Smith, deceased. At that time Charles H. Smith came out to California, and amongst other things involved in that citation on a complaint of some of the heirs—don't remember their names now—was the question of whether Mr. King had inventoried in the estate and accounted for all the property of the estate which he ought to. That was the basis of the citation; it was claimed that he had not. It also included an attack in some way concerning the deeds and conveyances. At that time Charles H. Smith came out here from Denver, and was at my office in connection with the hearing or trial of that case, which lasted some four or five days, and my recollection is that at that time he had this paper. It was not produced in court; I re-

member that distinctly, that it was not. I was at that time representing the administrator, in conjunction, as I remember it, with Mr. F. W. Sawyer, who was his regular attorney. That hearing never went any further than the examination made by the attorneys for the heirs. At the conclusion of the examination of the witnesses by them, Judge Ogden dismissed the citation. In the taking of that testimony this paper did not appear in evidence. But it was on that visit here, I am satisfied, that Mr. Charles H. Smith showed me this paper. I was not acting as his attorney then. I was representing Mr. King. He was at that time cited by some of the heirs whose names I do not now recall. I think Mrs. Snodgrass was one of them. It was an odd name, and I think Mrs. Snodgrass was one of the citing heirs. This was part of the evidence I was considering then in behalf of the administrator to discharge the citation. As I say, it never came to that, because when the hearing on the citation had proceeded to the point where the heirs had examined witnesses and rested, the citation was discharged without Mr. King's introducing, as a matter of defense, any testimony. I next saw that instrument at some time in the year 1900. Approximately six or seven months ago to ten months ago. That was in Oakland at my office. Mr. Charles H. Smith had it then.

Cross-Examination.

I could not fix the date in 1898 when I first saw that document, but my recollection is, it was the latter part of 1898 or early in 1899, when that hearing came up of which I spoke, was the time. I was representing Mr.

King, the administrator at that time in part. I think his regular attorney, Mr. Sawyer, was there also. I was working in conjunction with Mr. Sawyer in the matter of that citation. The heirs were complaining in the complaint on which the citation was issued, that Mr. King should have inventoried the bonds and some other property, and they were also assailing his accounts, I remember, at that time. There was a long list of items in his accounts that they objected to and the citation was in regard to that matter. I cannot remember whether or not I told Mr. King that I had seen such a paper as that.

Q. At any time between the time you saw it in 1898 and the time you saw it in 1900, did you say to Mr. King that you had seen any written evidence of any character of an assignment of these bonds?

A. I can't remember. My impression is that it was talked about more than once between Mr. King and myself.

Q. What was talked about?

A. About the fact that Mr. Charles H. Smith having this assignment or paper.

Q. Will you swear that it was?

A. Oh, I can't swear positively, because there were so many conversations between clients and attorneys, and between different attorneys in the same case. I cannot remember any particular time or place in which that occurred. But Mr. King has talked to me in the presence of Charles H. Smith so many times about it, in which conversations the ownership of the bonds by Mr. Charles H. Smith was discussed, so I cannot say whether this particular paper was talked about, or anything about it.

I am satisfied that I have stated to him that this paper was in existence, but I don't think, at least, I don't recall, whether Mr. King was present when Mr. Charles H. Smith showed me this paper. They would frequently be in the office together, and frequently not.

Q. You are satisfied you did?

A. I am satisfied, yes, sir.

Q. Do you mean that your recollection is that you did?

A. Yes, sir. There is nothing in that recollection as to time, place, circumstances, or persons present, when I told Mr. King. I could not locate that, because there were so many conversations between Mr. King and myself during that trial and before and after it. I suppose I would be safe in saying there were a hundred.

Q. You simply have an impression that you did tell Mr. King about that?

A. No, sir, it amounts to more than an impression. I cannot fix the date in 1900 when I saw it, but it was at a time when Mr. King filed a report in the Superior Court of Alameda County for final distribution and settlement of his accounts—distribution of the estate—to which subsequently objections were filed. It was that matter, that transaction. On that occasion Mr. Charles H. Smith showed me that document. I cannot remember whether I told Mr. King that I had seen it then.

Q. You know that there has been considerable litigation in this regard in connection with the California and Nevada Railroad, and the foreclosure of the mortgage thereon, and the bonds of the railroad company, do you not?

A. I heard of it. I had talks with Mr. Judkins about that matter in a general way about the time of which I have spoken, that is, when the hearing came up in the Superior Court of Alameda County in 1900. That is the first time I ever knew Mr. Judkins. I cannot remember the date when that was. But it was anywhere from six months to a year ago. I do not think I ever talked with Mr. Judkins on the subject of these bonds since those matters were all in court there. I do not remember that I ever stated to Mr. Judkins that I had seen any such document as that. My impression is not. I was representing the administrator in the Superior Court of Alameda County when the question of the ownership of these bonds came up and Judge Greene appointed appraisers to appraise the bonds. And at the time he appointed Mr. Judkins as attorney for absent heirs. I heard discussions as to the ownership of these bonds in Judge Greene's court, more particularly at the time that Mr. Judkins appeared in these later proceedings in 1900. There were some lively proceedings in Judge Greene's court within the last year over the ownership of these bonds. The vital point in issue in all of these proceedings was whether the estate of J. W. Smith owned these bonds, or whether Charles H. Smith owned them personally. That was intimated. It did not come to issue before the Court. It was discussed, as I have said, with considerable vivacity and perhaps vehemence, I would not say with acrimony, but that was from the bar to the bench and from the bench back to the bar. There were not any trial proceedings.

Q. Did you ever, at any of these times, rise as a member of the bar of Alameda County, or a friend of the Court, or as attorney of the administrator, and say that this whole proposition could be settled in a very few moments; that you had seen a written assignment of these bonds to Charles H. Smith? A. I did not.

Q. Did you ever make any suggestion of that kind to the Court? A. No, sir, I did not.

Q. Did you ever intimate to the Court or to any of the counsel there present that you had seen a written assignment of these bonds?

A. I don't remember whether I did or not. As it came up, this lively performance that you refer to, it was so active that there was not any opportunity to state or to take any evidence about it. I remember Mr. Bolton trying to get a little further along with the proceeding, when he was cut off.

Q. Then the reason why you did not mention it was because there was so much talk there that you did not have a chance to chip in, is it?

A. No, sir, that is not the fact. The fact is that the Court appointed Mr. Judkins to represent the heirs, and said he didn't want to hear anything more about it on that proceeding, and that the administrator, Mr. King, to proceed to inventory them and get possession of them by whatever proceedings were necessary, if he could. So that matter ended rather summarily. I withdrew from the attorneyship of Mr. King, but that hadn't anything to do with it. I was not a part, Mr. Cannon, of the lively proceedings. I was simply a spectator, and it was be-

tween Mr. Bolton, representing some heirs, and Mr. Judkins, representing some heirs and the Court. I was simply sitting there in a neutral position as to the contest between the heirs and the Court, and Mr. Judkins representing other heirs. Mr. Bolton, the attorney for plaintiff, was in court during some of those proceedings.

Q. Did he ever make the statement in Court that there was any written evidence of the ownership of those bonds? A. I don't remember.

Redirect Examination.

Q. Mr. Davis, do you remember a conversation at that time in Judge Greene's court, which took place between counsel for Mr. C. H. Smith and Mr. Judkins, in which counsel for Charles H. Smith stated that there was an instrument in writing covering these bonds or words to that effect?

A. I have no clear recollection about that. There is an impression in my mind that that occurred, and that it was in confused talking—in the confusion between the bench and the bar. And yet I would not say positively that it did or did not occur. I know there were times there when I, as a listener, was not able to follow all that was said. At the time that that controversy in Judge Greene's court had got down to the ownership of these bonds, the account then pending had not quite been settled. I suggested to the Court that it be turned into an intermediate or annual account, and be settled in that way, and it was taken up and gone at and disposed of as an intermediate account. Mr. King at that time, and

before the account was finally settled, wanted me to go on with this litigation with regard to these bonds here, whether they should be inventoried here or not. There were two reasons why I did not go on. The first was that I had done a good deal of work and compensation was very meager, and I did not see any assets in the estate, and I told him I would not take it on a contingency, there was too much work in it. Another reason was that, during previous trials in the matter I first spoke of, on the citations and in many private conversations and conferences, Mr. King had stated, and the record of his testimony in that case shows, that the bonds did not belong to the estate of J. W. Smith, and I did not care to represent a client who had stated that in a courtroom in my hearing and then take the opposite position. Those were the two reasons why I did not stay any further as attorney in the case, in this matter.

J. W. HAVENS, called as a witness for the plaintiff in rebuttal and being duly sworn, testified as follows:

I reside at Gridley, California. My business is banking and real estate business. I have been engaged in the banking business fifteen years. I was connected with the Central Bank in Oakland about eight years. I was paying teller and assistant cashier. I went into the employ of the bank about 1892, and retired a year ago January. I knew J. W. Smith in his lifetime, and have had occasion to examine his signature. He was a customer or depositor of the bank.

Q. I show you a paper marked Plaintiff's Exhibit "G," and ask you if you will examine the signature to that

instrument and state to the Court whether in your opinion that is the signature of J. W. Smith?

A. (After examination.) I think it is.

Q. Will you state to the Court any difference between that signature, or the method of writing it, and the signature upon the checks which came into the bank, so far as you have observed them?

A. On his check he used to make a great many flourishes. He had transactions with the bank up to the time of his death, which occurred about five or six years ago. I have had occasion to see his signature and see him write. I have seen him write his signature. He came to the bank frequently. I have never seen him writing except writing his signature. He has gone to the counter and drawn checks, and I have paid them. From that observation of his signature and his handwriting I think the signature of Plaintiff's Exhibit "G" was written by J. W. Smith.

Cross-Examination.

I first saw the signature of J. W. Smith when he opened his account with the bank. I could not tell you the year when he first came there. I think it was a year or so before he died. It may have been longer. I learned his signature by paying his checks. I paid all the checks that were paid on his account. I think I have seen his signature on notes and documents at the bank. I could not say as to whether there was the same character of signature on those documents as on the checks with the flourish that I spoke of.

Q. Do you remember of ever seeing a signature of J.

W. Smith's with the straight line crossing the "t" and a line straight off at the end of the "h".

A. I could not say.

Q. During the time that you were cashing checks signed by Mr. J. W. Smith, do you know of his getting weaker and finally becoming sick?

A. No, sir, I do not. I remember that he did not come to the bank and that he was home, and they said he was sick. I remember paying checks for two or three months prior to his death. I do not recall any change in his signature from the time he first began to do business at the bank until shortly before his death.

Q. I show you a check being defendants Exhibit No. 13 of date August 15, 1895, and ask you to compare it with the signature of Plaintiff's Exhibit "G." Place them side by side and look at them? A. Yes, sir.

Q. Do you notice any difference in the characteristics of those two signatures?

A. Yes, sir. One seems to be a little more shaky than the other.

Q. In your judgment, then, as having knowledge of Mr. Smith's handwriting, you would say that that signature to the bank check appears more shaky than the signature to Plaintiff's Exhibit "G"?

A. A little more shaky in this, yes, sir. The signature to Plaintiff's Exhibit "G" appears more strong and firm and vigorous looking, it is heavier. The lines are smoother. There is less tremor.

Q. Having the appearance as though made by a stronger hand?

A. No, sir, it might be; you know, that a man when he stands up and when he sits down writes differently. He may be in a position that his hand trembles.

Q. Do you see any more difference between these two signatures than the difference that ordinarily occurs in the signature of a man in his position, sitting and standing?

A. I think the general characteristics are the same.

Q. That is not what I asked you?

A. What was that question again?

Q. I am asking you if you do not see more difference, particularly with the tremulousness and the weak character of the signature—more difference between those two than ordinarily occurs between the two signatures of a man where he stands and sits? Is there not a greater disparity between those two?

A. It depends upon the man.

Q. I will show you a check of August 19 and one of August 6th, and ask you if those signatures do not bear the same tremulous characteristics as the check of August 15th? A. Yes, sir.

Q. Do you find any of that tremulousness in the signature to Plaintiff's Exhibit "G"? A. No, sir.

Q. Examine it very carefully?

A. This (Exhibit "G") is plainer.

Q. I show you checks running from April 2d up to October 2, 1895, and ask you if you do not find the same tremulous characteristics in those signatures, and in the ones immediately before and after the date of the instrument in question?

A. (After examining checks.) Some of these are tremulous and some are not.

Q. Pick out one, Mr. Havens which you say is not more tremulous than Plaintiff's Exhibit "G."

A. (After examining further.) There is one dated April 6, 1895. (Defendant's Exhibit No. 7.) That does not show it.

Q. You say the check Defendant's Exhibit No. 7 of April 6, 1895, does not show any more tremulousness than the signature in question? A. No, sir.

Q. You say it does not. A. No, sir.

Q. I ask you to look at them both through this glass, and see if you still make the same answer?

A. (After examining through the glass.) There may be a little slight bit more on the check.

Q. That is the check of April 6th may contain a little more tremulousness than the instrument in question?

A. Yes, sir, it may, but it looks that way on account of the scroll there is here.

Q. I show you, Mr. Havens Plaintiff's Exhibit "H," being an instrument dated the 27th of May, 1890, and ask you to compare those two signatures and see how they compare as far as tremulousness is concerned?

A. You see the paper has something to do with that—written on this paper it naturally might be a little more tremulous than on heavier paper, the paper would naturally catch the pen a little. I think the one on the thinner paper a little bit more shaky.

Q. Which do you call the thinner paper, Plaintiff's Exhibit "H"? A. Yes, sir.

Q. Then you would say that that paper of date 1890, appears more tremulous than the signature in question?

A. Very slightly, yes.

Q. I show you Plaintiff's Exhibit "G" and ask you to compare the signature of that with the signature in question, and state which appears the more tremulous?

A. (After examining.) I think probably Plaintiff's Exhibit "G" does a trifle more. I don't believe I would call it tremulous. It looks to me as though this was written with a finer pointed pen than this one, and that would account for the little difference.

Q. Do you find any similarity in shading between Plaintiff's Exhibit "I" and the instrument in question?

A. Yes, sir, somewhat. On the "S" there, the down stroke is shaded. The shading in the "S" is rather uniform. It increases gradually and decreases gradually. I find the same characteristics in the disputed signature.

Q. Mr. Haven, from your knowledge of signatures and handwriting do you find that, as a man advances in age and sickness overtakes him, those conditions have any influence upon his signature? A. Yes, sir.

Q. Would advancing age and sickness account for the tremulous conditions that you notice in some of these signatures?

A. Well, a man might be at certain parts of the day more tremulous than at others, or may have been taking medicine, or something, you know, to cause that.

Q. In other words, under some circumstances a well man might write a very tremulous signature, might he not? A. Yes, sir.

Q. But I mean an ordinarily tremulous signature, as you see it, in the usual business transactions, could that be accounted for by the fact that a man was of advancing age and ill?

A. I should say it would make a difference.

Q. Were those signatures of J. W. Smith that I have shown you now, from 1885 to 1890 and down to the time almost immediately prior to his death—in those signatures do you find a gradual increase in the tremulousness of the signatures?

A. Well, I didn't notice the dates of those checks, or arrange them in chronological order.

Q. The checks ranged from April 2d up to October 2, 1895.

A. Some of these are more tremulous than others.

Q. One that you picked out as being the least tremulous of all was dated April 6th. Did you notice some dated after April 6th that were quite tremulous?

A. I didn't notice the dates.

Q. The ones of August 15th and 19th were called to your attention?

A. It was more so in those than in the other, yes.

Q. Then the ones of those dates appeared more tremulous than the one of April 6th. A. Yes, sir.

The COURT.—Does ink or pen have anything to do with the signature?

A. I think so, the pen; a sharp-pointed pen, or a pen that a person is not accustomed to write with, would be more tremulous than if he was writing with a smooth-

nibbed pen. If a pen caught a little bit in the thin paper, it might make it more tremulous.

Q. Do you mean to say that a stiff pen, and hard thick paper makes a stronger signature than a thin paper or a fine pointed pen? A. Yes, sir.

Mr. CANNON.—Q. For instance, if, on the disputed signature, at the time that signature was written, the paper was very thin and fine, the signature would be likely to be more tremulous? A. I think so.

Redirect Examination.

That which makes a signature tremulous depends upon various conditions.

The COURT.—Q. I call your attention to a letter apparently dated, Oakland, Cal., September 30, 1893, and ask you if that is the signature of J. W. Smith?

A. (After examining paper.) I think so.

Said document was offered and admitted in evidence for the purpose of the signature marked Plaintiff's Exhibit "L" and is as follows:

Plaintiff's Exhibit "L."

"Oakland, Cal., Sept. 30, 1893.

"Dear Daughter Laura: I hear, from others that Charles is actually coming out to California. I have written him suggesting he had better face the music & try & settle up his tangled affairs before he leaves. Don't you think it would be best. I have to a great extent settled up. I don't really own a foot of land in Cal. & only

one thing not disposed of. If you and Mary would only accept the Mansfield Orchard a part of which you paid me for in cash the other part as a donation out & out, no trust. If you do not I will not give it to any other of the family, but might give it to some charitable association here, and that would end it. I do not wish to do so.

Your afft. father,

“J. W. SMITH.”

C. K. KING, called as a witness for the plaintiff in rebuttal and being duly sworn, testified as follows:

My name is Charles K. King. I reside at Oakland, California, and have resided there about fifteen or twenty years. I am one of the defendants in this action and the administrator of the estate of J. W. Smith, deceased. I was appointed administrator a short time after his death. He died November 15, 1895. I had known him eight or or ten years prior to his death. I know the plaintiff, Charles H. Smith. He was the son of deceased. I was employed by J. W. Smith in his lifetime in the operation of the California and Nevada Railroad, and also in the mining business, building and loan in Plumas county. I was also employed by him to attend to him, to do certain things for him during his sickness. He paid me for it. I do not think these employments were continuous. There was a break, then another during the eight or nine years I knew him. I was in his employ probably four years, it may be more. I was in his employ during his last sickness. I suppose that continued four or five months. I went there every day, mostly every day and did writing for him. Wrote some letters for him and

brought him fruit to eat. He could not leave his room and such things as that, read him papers, and any little act he wanted me to do in that way. That covers over a period of about four or five months. I suppose it ceased at the time the regular nurse was hired, Mr. Cunningham. I did not go quite as often then as I did before. The nurse was employed about three months before his death, I suppose. At that time he was at Mrs. Stewart's house. He had been there for some three or four years before that. He had a room there. I believe he had the same room in that house always. He used it as a sort of office. He had a desk and table and a wardrobe there. He kept papers in his desk. Before he became sick I went there frequently for the purpose of transacting business with him. It was in the summer of 1895 before J. W. Smith died that he first talked to me about the disposition of his property. I suppose that it was some months or so before he died. A month or to before he died perhaps, Charles Smith, the plaintiff, came out from Denver during that summer. I think it was some time in June or July. I don't know which month until I refer to my papers. It was after Charles Smith had come out from Denver that he talked to me. He may have talked to me before that. I cannot say as to that. I really do not know. I think he talked to me on more than one occasion.

Q. You say you have in mind now one occasion upon which he talked to you. State to the Court what he said to you at that time.

A. Well, he said that he had given his property away to his children, that is, I don't know whether he said all of it; most of his property, I think he said, and that his son would have the—that he had given his son the railroad. I don't think I ever had any talk with him about what his interests were in the railroad.

Q. Did you ever have any subsequent talk with him about the disposition of his property?

A. I might have had. I really don't recollect. He talked to me two or three times about it, and it was about the same thing each time. I remember being cited in to the Superior Court of Alameda county to show cause why I should not place the bonds of the California and Nevada Railroad Company, three hundred and four bonds in the inventory of the estate of J. W. Smith, as property belonging to the estate, and of having testified in response to that citation.

Q. State whether or not Mr. J. W. Smith ever stated to you that he had parted with the bonds of the railroad, had given them to his son.

A. Yes, sir. I could not say when he made that statement. It was, as I said before, some couple of months before he died, I suppose. I recall the deeds having been made by Mr. Smith. I was sent to bring a notary public to his room to take the acknowledgments of such deeds. I was sent for W. R. Thomas, who was here yesterday. I do not recollect whether I saw the deeds after they were executed. I saw them, I think, before. J. W. Smith made several statements about the bonds. I think they were before I went to Mr. Thomas to acknowledge the

deeds, and probably after, also. I cannot recollect about that. I was not an interested party in any way. It was by reason of the statements made to me about the bonds that I did not put the bonds in the inventory of his estate. What he said and what his son said also. I believed them. The bonds have been inventoried in the estate. It was immediately after the order of Judge Green at the instruction of Judge Green to me, to have these bonds inventoried into the estate, and the appointment of the appraiser. Bonds were appraised. At the time of or immediately after the hearing on the citation a demand was made on me regarding the bonds by an attorney for one of the heirs. I don't know whether it states one or more of the heirs. A written demand was made on me to endeavor to bring into the estate these bonds, and also offering to furnish him money, costs for the same. Mr. T. C. Judkins was the attorney that made that demand. That was just before or after Judge Green ordered an appraisement of these bonds. It took several days in the court, and I don't know exactly when. It was some time in 1900.

Mr. BOLTON.—Q. I will call your attention to a letter dated November 6, 1895, and ask you if that is in your handwriting (handing)? A. Yes, sir.

Q. Turn it over to the back. Is that in your handwriting also?

A. Yes, sir. That was written in Captain J. W. Smith's room at his boarding-house. It was written at his instance, at his dictation. It was all written in the room. Mr. Smith kept two or three bottles of ink there,

and he had blue ink and black ink and pencils there. He always had two or three bottles of ink there and different colored ink.

Said document was thereupon offered in evidence, the part in pencil marked Plaintiff's Exhibit "M," and the part in ink marked Defendant's Exhibit No. 22 and read as follows:

Plaintiff's Exhibit "M" (in pencil).

"November 6, 1895.

"Dear Son: Yours of 3d inst. to hand. I notice all you say. You say you will be with me shortly and that you are getting things in shape to leave and that you can come at a moment's notice, etc.

"Well, do not expect me to give the notice, my peculiar feelings as you say belong to me as well as other people's feelings.

"I will never request you or any others of the family to come to see me in my condition knowing that they cannot help me.

"Come when you please if you please. I have asked Mr. King to write the foregoing and now tell him to write what he thinks proper on his own account.

"Your afft. father,

"J. W. SMITH,

Per K."

(Reverse side:)

Defendants' Exhibit No. 22 (in ink).

"Dear Sir: Your father dictated the above and told me to say what I pleased and not to tell him what I did say. I know that he wants you to come out that which he says to the contrary notwithstanding. He said to me this morning "Well, if Charley is all ready to come why don't he come." He seems better this morning than he has been for couple of days. He asked for the "Call" and read the paper, something he has not done for two weeks. I drew check for \$100 for Capt. Thomas this noon. I have not kept his day book posted up as he directed me to just lay the papers in the desk.

"Your truly,

"C. K. KING."

There was more than one kind of ink there most all the time I knew him. He liked a certain kind of ink. Other people didn't like it. I often objected to the blue ink on account of the paleness of it. I never used it myself.

Cross-Examination.

He seemed to like blue ink. I think he wrote a good deal with the blue ink.

Q. You said, in answer to a question of Mr. Bolton, as to whether or not you had ever heard J. W. Smith say he had given the bonds to Charlie—you answered in the affirmative. I will ask you if the fact as you have stated and explained several times heretofore, the statement was that he would give or had given the railroad to Charlie, and not the bonds?

A. Coming to look at my testimony, which is nearer the time of his death, I find that I did testify bonds, and I think he did say bonds.

Q. You stated last Tuesday, Mr. King, did you not, when your deposition was taken in Oakland, that he did not say "bonds" but said "railroad"?

A. He said "railroad," and then when my testimony in the Superior Court was brought to my notice, I think I said, "He may have said bonds; that he did say bonds."

Q. Your testimony in the Superior Court was read over by you, Mr. King, before you gave your deposition?

A. Not before. During the deposition, it was done to refresh my memory I think, in several instances.

Q. After you read that over, you still stated, did you not, that the statement was that he had given to Charlie the railroad?

A. I don't really recollect now what that statement was; he had several interviews, as I say with me about it.

Q. He did not own the railroad?

A. Yes, sir, he was operating the railroad. He had a desk in his room and writing materials there and had paper, writing paper and note paper and envelopes. He had different kinds of paper there. A good deal of it. He generally bought a quantity at a time, a good deal. It was paper without heading, such as I have written on in the exhibits here. I think it was what was called letter size. Such as I have written on here in Defendants' Exhibit No. 22.

Q. I will ask you if you did not testify in the Central Bank in Oakland, a week ago last Tuesday in your deposition that was taken there, as follows: "Q State whether or not J. W. Smith ever made any statement to you about his property affairs or a disposition he had made of his personal property?"

A. Yes, he talked about it several times. He said that he had given some of his pieces of ground to his children, and that Charlie would have the road, the railroad. I don't think he mentioned bonds to me. He said the railroad, that he had given Charlie the railroad. I don't think he mentioned the word 'bonds' to me. I think he mentioned the railroad." Is that correct?

A. I did testify in that way.

Q. Is that correct?

A. Yes, sir, it is correct partly, and partly, perhaps, not. I testified, I think, in the Superior Court that he did say bonds at one time—he had several interviews with me, and he may have said bonds, and I think probably he did.

Q. You just think probably he said bonds?

A. Yes, sir, I am almost certain he did at one time; I don't know which time it was. I didn't burden my memory with those things because I thought the estate was about settled up, and there was nothing more in the estate. I never paid any attention to it, never attempted to retain in my memory any of these conversations, because it was none of my business and I was not interested in any way. My recollection is dim as to the exact way he put it, his exact words. The substance of the

conversation is correct. My present impression is now that he did say bonds.

Q. And you have obtained that impression since your deposition was taken a week ago last Tuesday?

A. About that time I think you produced there at that examination my evidence in the Superior Court of Alameda county, and I read it over carefully, and I said that was correct.

Q. But you then explained, after reading over the testimony there that you were still of the impression that it was the railroad that you were referring to in that testimony?

A. The railroad meant the bonds; the railroad meant everything that went with it.

Q. I call your attention now to part of the deposition or testimony that you gave. There is this question quoted from your former testimony: "Q. And all you know about it is what the old gentleman said and Charles H. Smith said? A. Yes, sir. He said he had no further stock in the California & Nevada Railroad, no stock or bonds; he had given it to his son." When your deposition was taken, did you call attention to the word "it," and explain that by using that word "it" you referred to the railroad instead of to the stock and bonds?

A. I don't recollect what I said there, independent of this evidence.

Q. Do you remember that word "it," calling attention in your testimony to the word "it"?

A. Yes, sir, I recollect the California & Nevada Railroad, and the stock and bonds.

Q. I speak particularly with reference to the word "it" now?

A. I don't. I haven't really—I know that his son told me that he had the bonds of the railroad several times, as well as the old gentleman.

Q. I call your attention to the following question and answer: "But you made no effort as administrator of the estate to try to look it up and get it back to the estate, have you?"

A. None at all, because Mr. Smith told me himself he did not own it, it had passed out of his hands." I ask you if you called attention to that after reading it, and stated that you referred to the railroad?

A. It was natural enough that by using the word "it" I referred to the railroad.

Q. And that is the way you explained that at that time? A. Yes, sir.

Q. What proceedings have you taken in this matter, Mr. King, have been upon the demands of the heirs and pursuant to the orders of the Superior Court of Alameda county, have they not—in the matter of the recovery of the bonds? A. I haven't taken any action, sir.

Q. That is, the notice to the California Safe Deposit & Trust Company not to turn over the bonds?

A. Yes, sir. On that question by direction of the Court, which I considered very good advice, and also by the decision of the master in chancery.

Q. Those and matters that have come to your attention subsequently to your original action in not attempting to recover the bonds?

A. Yes sir, I generally ask the advice of the Court as to my actions in the estate, and he so advised me here.

The witness was here examined on behalf of defendant as a witness in surrebuttal.

Mr. CANNON.—Q. I show you now Plaintiff's Exhibit "G," and ask you if you ever saw that document before?

A. I saw that at the Central Bank only a few days ago.

Q. Did you ever see it prior to the day of the taking of Mr. Palmanteer's deposition in the Central Bank of Oakland?

A. I did not.

Q. Did you ever hear of its existence?

A. I did not.

Q. Did anybody ever tell you of its existence?

A. No, sir. I saw it at the taking of Mr Palmanteer's deposition at the Bank a few days ago, when Mr. Bolton was there and introduced it.

Mr. BOLTON.—Q. State whether in your opinion, that is the signature of J. W. Smith?

A. I should say it was, leaving out the exception of the straight cross to the "t," which I never knew him to make. He made a twirl around his name, and I have never seen his name written in any other way, but the letters are formed in exactly the same way.

The COURT.—Mr. King, the question is whether that is his signature, or not. There are no exceptions in a question of that sort.

A. I would not say it was not, and I would not say

it was. I don't like to testify; I could not positively testify if a man wrote his name exactly as he has always written it, that it was his signature. But it looks like it.

Mr. BOLTON.—Q. You have testified on cross-examination regarding paper in the room of the deceased, J. W. Smith. State what the habits of the deceased were as to keeping scraps of paper?

A. He always did that. He cut a good deal of paper out of unused blank books, and he had various kinds of paper there. He wrote a great deal with a lead pencil. He hardly ever wrote with ink himself during his illness. He was sitting up propped up in bed, and he would make a great many memorandums on different kinds of paper. He used to make memorandums on almost everything. He had some blue paper and some yellow paper, and sometimes old advertisements he would turn over and write on the back of, to make memorandums. I never knew him to use any uniform paper.

Mr. CANNON.—Q. I show you part of this Plaintiff's Exhibit "G" above the name "J. W. Smith," and ask you first if you know Charles H Smith's handwriting.

Mr. BOLTON.—We admit that is the handwriting of Charles H. Smith.

Mr. CANNON.—You admit that all of this above the signature is the handwriting of Charles H. Smith?

Mr. BOLTON.—Yes.

Mr. CANNON.—We will accept that admission.

CHARLES H. SMITH, recalled in his own behalf in rebuttal, testified as follows:

I am the plaintiff and son of J. W. Smith, deceased. My father died on November 15, 1895.

Q. Do you remember where you resided at that time?

A. I had come out here to live at that time. In the summer of 1895 I resided in Denver and was in business there. I came out here that summer, the latter part of July. My father was at that time residing at Mrs. Stewart's, in Oakland. I had previously stayed at that same place. After I came out in July I had a conversation with my father about his property affairs. That was immediately after I came out in July. In substance it was in reference to the disposition of all of his property, real and personal.

Q. State whether or not there was any inventory or memorandum shown or given you by your father regarding that matter.

A. There was. That was in the fore part of August. He made a list of all of his real estate, with directions as to the various members of his family to whom he wished it deeded, and instructed me, after talking and discussing the matter, to draw up deeds to the various pieces of property, which I did. I have not these deeds nor that inventory. I have torn the inventory up, I presume. It was just simply a direction, and after the deeds were made, there was no occasion for keeping it, and it was destroyed. It was of no value at all. I have not had it since the deeds were drawn up. I drew up the deeds at my father's suggestion. I should say it was possibly a week after I drew them before they were executed. I cannot say the exact number of days. After they were

drawn up and prior to the time my father executed them, they were examined by him. They were examined the day before they were executed. It was on the 14th. The notary who took the acknowledgments was Captain W. R. Thomas.

Q. I now hand you Plaintiff's Exhibit "C," and ask you if you ever saw that paper (handing)?

A. Yes, sir.

Q. That is in your handwriting? A. Yes, sir.

Q. State the circumstances under which it was written.

A. It came about in this way: The afternoon before the signing and acknowledgment of the deeds, father asked me to bring him in the deeds, or to give him the deeds, and he read them over carefully, and we compared them with the list which had been made out, and he said, "Well, that is all right; we will fix up the matters," or words to that effect. The next morning—that was on the morning of August 14th—he said, "Charlie, let's fix things up." And as he was lying in bed, he handed me a scrap of paper and he said, "Write a bill of sale upon that," which I did. I remember it very well, for the reason that it was on a small piece of paper. He dictated the substance of the assignment to me, and when I had it written he said, "Let's see it." He looked it over, and he said, "That's all right, I guess," or something or other; I don't remember the exact words. Shortly after that he got up, went over to his table without the aid of a chair, as he usually had—he had the cane there, and once in a while he would go over to the table

or walk a little all around the room. He sat down at the table, and he wrote his signature to it. Then he took it up and he said, "Well, *that* a pretty good signature," and handed me the paper. The afternoon of this day, or about noon, I guess—well, it was some time during the day—Captain Thomas came in and took the acknowledgments of the deeds. He told Captain Thomas, he said, "I don't own a thing in the world. I have made disposition of all of my property. I have deeded away my real estate and my stocks in the mining companies, and the bonds of the California & Nevada Railroad Company I have given to Charlie."

Q. State whether or not that was in the same condition then that it is now?

A. I pasted that paper on the back of it. I think that was two or three years after the death of father. This was becoming considerably worn by reason of my having it in my pocket-book so much, bringing it out here, and to preserve it I pasted it on this white paper—I think it was a receipt, or something of that kind, if I am not mistaken. After that I remained here until the second or third of September. During the time I was here Abner Doble visited my father. It came about in this way: Father and myself had discussed the matter of the disposition of his property, and he was particularly desirous of avoiding litigation and having everything fixed before he passed away and in connection with the bonds, I spoke to him about this bill of sale, and he said, "Charlie, I'll fix a better way than that," or something or other, I don't know just what; "I will tell Mr. Palmanteer, Mr. King,

and Mr. Doble what disposition I have made of these bonds, and I will direct Mr. Doble to give you these bonds. I want you to go over and have Mr. Doble come here to my room so that I can tell him that I have given you these bonds." Mr. Doble came in response to the request of my father. I had requested him myself to call. I was present when he called. He came there in the room and talked on various matters, and while he was there, having been confined to the room very closely, I asked Mr. Doble if he was going to stay some little time and he said he would, and I went out. I left the room and went out for a walk. I was gone some little time. I don't remember now, and when I came back Mr. Doble had gone. Some time after that father told me what he had said to Mr. Doble, and he said, "Charlie, I have given Mr. Doble an order to deliver you these bonds, and told him that they belonged to you. That I had given them to you." During the time I was out here I made a deposit in the Central Bank. That was in the month of August. The circumstances were, that father was needing money, and inasmuch as he had disposed of all of his property, giving me the stocks and bonds, he would need money for the carrying on of these various things and for his personal needs. For that reason I opened a joint account in the Central Bank, subject to the check of either, and I left on deposit in the bank there \$2,500.00 on the 26th of August. The money was obtained from Denver. I gave my personal check on my Denver bank, which I have with me. I went east some time early in September. I returned about the 10th or 11th of Novem-

ber. I have heard the testimony in regard to the receipt given by me to Mr. Doble. I received the bonds in controversy on that date. I came over to Mr Doble's office for the purpose of getting the bonds. I asked Mr. Doble if he had an order from father and instructions to deliver me the bonds, and he said he had. We then left his office and went to the safety deposit box—I don't remember just where they were—it was down in a basement, I remember of going down in the basement, and I got the bonds. We talked some little time down in the vault, came out on the street and walked leisurely down Market street, stayed there a little while, and Mr. Doble asked me to come down to his office. I went down to his office and we sat down about fifteen or twenty minutes to chat about various things. Then Mr. Doble suggested that he had better take a receipt. I said, "All right," and he dictated the receipt to his typewriter or stenographer, who was then in the office, and gave it to me to sign. I said, "How do you want me to sign, Mr. Doble?" "Well," he said, "inasmuch as I have given a receipt to Mr. J. W. Smith, you had better give me a receipt in J. W. Smith's name." I said, "All right," and I signed it J. W. Smith, by C. H. Smith.

After that the bonds were in my possession up to the time I placed them in the California safe deposit vaults. I received at that time an order for seventy-five bonds. That order was sent to the Central Trust Company of New York to obtain the seventy-five bonds. It was a requisition given by the company to father for seventy-five bonds on account of construction work. I afterward

received those seventy-five bonds from the trust company in pursuance of that order. I received them by express. After my father's death, I got the checks that were drawn against the account at the bank. I have some of them with me in San Francisco. Not in my pocket now.

Cross-Examination.

Plaintiff's Exhibit "G" was written in my father's room, on the 14th day of August, 1895. I do not think there is any question about the date. He was in bed at the time and handed me a slip of paper. I think that slip of paper was of the same size and dimension as the piece introduced in evidence here.

Q. Do you know whether or not it was?

A. Oh, I will say this. It might have been a little larger, perhaps it was a little larger, or probably it was a little irregular. That is all I can tell you. I cannot say that it was rectangular in shape the same as it is here. I cannot say that it was folded. I don't suppose it was. I don't think it bore any evidence on its face of having been folded.

Q. Did you cut it down with any scissors or any other implement after that?

A. I don't know whether I did that or not. I don't think I did. When I wrote it I sat either at the desk or table. Which it was I could not recall, they were right close together. Sometimes I would write at the desk, and sometimes at the table. That was the same way with my father. My best recollection is that I sat at the desk. I generally did the writing at the desk, when

I wrote in father's room, and he generally at the table. But I could not say for a certainty whether it was at the table or the desk. My father sat at the table when he wrote his signature. That was in the morning. Possibly an hour after I wrote exhibit "G." I don't suppose anything was done with the pen or ink in the meantime. I don't remember whether or not a bottle was used at the time I wrote it. I don't think father used a blotter, though I can't recall. I don't know whether we used the same pen and the same ink, or a different pen and different ink. I don't know what kind of pen he used. He used all kinds of ink, but I don't remember as to the ink at that particular time. He was sitting at the table when he wrote it. He probably sat there for an hour or more. I didn't notice particularly how he held the paper in front of him. I saw him when he signed and saw him make the characters. I do not know how he was holding the paper on the table. It was right before him as he commonly held paper, I suppose. I can't say just exactly how it was. I do not know whether he used a sharp pen or a stub pen. I have no recollection at all of the kind of pen, whether it was the same pen I used. I have no recollection what kind of ink he used or whether it was the same bottle of ink I used, or whether we both sat at the same table or desk. I pasted it on the paper upon which it appears to be pasted now, quite a while after the signing of it, possibly three years. In the meantime I had it back and forth. When I came out I generally had it in my pocket-book, and when I was at home I kept it in my safe.

Q. And you say you had pasted it on there because it was considerably worn? Will you point out the worn parts?

A. I can't do that. It was just getting sort of soft and flimsy by having been in my pocket-book and hands. That is all. I do not know whether it would wear first at the edges or not.

Q. Just look and see if you can see any sign of wear on it?

A. I don't know of any particular part that is worn. It was just getting kind of flimsy, as I remember. I don't know that there is any particular part of it flimsy. No particular part of it attracted my attention as being flimsy. At the time my father signed that document he did not ask for any particular pen nor make any selection of a pen. He did not ask for blue ink nor any ink. It was on the table. I did not search for the memorandum of the deeds that my father wanted me to draw up. I made no search for that. Of the real estate to which I was directed to make deeds an undivided two-thirds of a block of land in Oakland went to me.

Q. That was the most desirable of all the property, was it not?

A. No, sir. That was all that was deeded to me. It is in the northern part of Oakland, what is known as block 3, Emeryville, probably you might call it part of Emeryville.

Q. Name the children of your father that were living at the time of his death?

A. Mary M. Clark, Laura W. Porter, Margaretta G.

Rice, Martha J. Hart, Annie K. Cayple, now Mrs. McLean, Albert B. Smith and Charles H. Smith. Margaretta G. Rice has since died, leaving issue.

Q. You say these deeds were signed in the afternoon?

A. I cannot say as to the signing in the afternoon. They were signed at or about the time that Mr. Thomas came. My impression is that it was about noon as I stated, but it seems to me it was in the afternoon. It was several hours after Plaintiff's Exhibit "G" was signed. The exhibit there was signed in the morning and Mr. Thomas came at or about noon or in the afternoon.

Q. I understood you to say along about 10 or 11, Plaintiff's Exhibit "G" was signed.

A. I didn't say 10 or 11. I didn't fix an hour. I can't fix an hour. I could not say with what kind of ink the deeds were signed. I could not say with what kind of ink the acknowledgments were written. I don't remember the color of the ink.

Q. Where are these deeds now?

A. They are, I presume all of them in Denver—probably. None of them are in this State.

Q. Can you produce those deeds?

A. No, sir; if I was in Denver I could. I can produce them by going to Denver. I cannot by sending for them, because some of them are in my safe, and no one has the combination to that safe except myself. I drew those deeds in my room at Mrs. Stewart's. I don't remember where I obtained the ink to draw the deeds.

Q. Mr. Smith while lying in bed handed you a slip of paper and said to write a bill of sale on that, did he?

A. Yes, sir.

Q. What other words did he say?

A. I cannot recall what he said. He just said, "Charlie, write a bill of sale on that," or words to that effect. That was the substance of it. Then I sat down and wrote it. He dictated it. I think he dictated the whole of it about as it is written. Lying in bed he dictated that document just as it stands.

Q. Did you have any memoranda or anything to refresh his memory.

A. Yes, sir, had an option contract there.

Q. Where did he obtain the option contract?

A. Had it there in his room.

Q. Where did he get it?

A. He was entitled to it.

Q. How did he get it in his hands?

A. He probably asked me for it.

Q. I am not asking you where he probably did.

A. I don't know how he got it then.

Q. You don't remember about that?

A. I know it was there.

Q. What do you mean by there?

A. In the room.

Q. I am asking you how your father happened to have in his mind at the time he was dictating from his bed the data necessary to draw up that paper?

A. I can only say that I assume on account of having the option agreement there.

Q. Then your explanation is that you assume because he had the option agreement in his room, he had the in-

formation from which to dictate this document from his bed.

A. Yes, sir. He delivered it to me after it was written. I cannot recall the exact words he used.

Q. You testified to some words this morning?

A. Yes, sir. I said he put it up and looked at it, and said something like this, "That is a pretty good signature, Charlie." Then I took possession of the assignment.

Q. Was anything else turned over to you at that time?

A. Yes, sir.

Q. What?

A. Some, well, in fact, all of his personal effects were virtually turned over to me at about that time, before I went back to Denver.

Q. I am speaking about that time. At the time he gave that assignment to you, did he turn anything else over to you?

A. No, sir, not right then. I should say Mr. Doble called within a week after the 14th of August. I remained there part of the time, and then went out for a walk and returned. After I came back my father said he had given Mr. Doble an order to deliver the bonds. At the time I went to Mr. Doble's to get the bonds I did not produce the assignment. At the time I was getting the seventy-five bonds from the Central Trust Company of New York, I did not produce the assignment. These seventy-five bonds were represented by an order on the Central Trust Company to deliver the bonds to J. W. Smith. Either Mr. Doble or Mr. Emery, I forget which, went down with me to Wells, Fargo & Company's office,

as I recall it, and the requisition was given to them for the purpose of getting the bonds from New York. Just the details in connection with it, I cannot recall. At the time I went to Wells, Fargo & Company to arrange for the delivery of the bonds I did not produce the assignment, Plaintiff's Exhibit "G." I testified as a witness in the Superior Court on December 15, 1898, on the matter of the citation in regard to the bonds. I do not remember as to the date. I testified in regard to these bonds and the ownership of them. I did not produce that assignment then.

Q. I ask you if, on that day in the Superior Court of Alameda County, in the matter of that citation, you testified as follows: "Q. At the time these deeds were signed and acknowledged here in Oakland, or at the time when you talked with him about the drawing of the deeds—at that time was there any property of his disposed of by him outside of the real estate? A. Yes, sir. Q. You can state what and how it was disposed of, what he did about it. A. All of his personalty he transferred over to me at the time that he drew up these deeds, which was in August. Q. That property consisted of stocks and some Narrow Gauge Railroad bonds, and the like? A. Yes, sir. Q. Were they delivered to you at that time by him? A. Yes, sir."

Q. Did you so testify?

A. I probably did. I have always considered that they were delivered over to me from the 14th of August.

Q. Did you testify as follows at that time and place? "Q. Was there any other stock besides those? A.

There was one share of stock in the California & Nevada Railroad Company. Q. That is all the stock he gave you? A. That is all the stock. Q. The bonds, how many did he give? A. Three hundred and four. Q. Of what? A. The California & Nevada Railroad Co. Q. Of the face value of \$1,000 each? A. Yes, sir. Q. Were the bonds and stock endorsed by him in your presence? A. The stock was endorsed; the bonds were not. Of course, there was no endorsement goes with them. Q. The stock was endorsed? A. Yes, sir. Q. By him in your presence? A. Endorsed and transferred long before he died."

Q. Did you so testify? A. Yes, sir.

Q. Did you testify at any subsequent time in the Superior Court of Alameda County?

A. I think not; I don't remember now. I was present for one session of the court when the matter of the ownership of the bonds came up.

Q. Did you produce the assignment at that time?

A. No, sir. There has never been any occasion for it. I intervened in the litigation in the Circuit Court of the United States for this district in the foreclosure matter, setting up my ownership of the three hundred and four bonds in question.

Q. You know of testimony having been taken in that matter, do you not?

Mr. BOLTON.—I will caution the witness that that is of his own knowledge.

A. Not of my own knowledge.

Q. You do not know then that testimony was taken in the foreclosure matter?

A. I have never been here when any testimony was taken?

Q. You have no knowledge then that the matter was ever heard before the master in chancery, or otherwise?

A. Since that time I have been informed, of course.

Mr. BOLTON.—For the purpose of saving time, I will admit that it was not produced, and that no evidence as to the ownership of the bonds was offered in that case except the production of the bonds.

The COURT.—Is that admission sufficient?

Mr. CANNON.—We understand that to be the fact, and are willing that that admission should go in evidence.

Mr. BOLTON.—If his attorney made a mistake as to not putting in other testimony—

Mr. CANNON.—Is that part of the admission?

Mr. BOLTON.—I do not know. That is part of the argument.

Mr. CANNON.—Q. Now, Mr. Smith, I show you a letter dated September 11, 1895, purporting to have been signed by yourself, and ask you if that is your signature (handing).

A. Yes, sir; that is my signature. Let me read it. I wrote that letter.

Said letter was offered and admitted in evidence, marked "Defendants' Exhibit No. 23," and is as follows:

“Defendants’ Exhibit No. 23.

“Denver, Colo., Sept. 11th, 1895.

“C. K. King, Esq., Oakland, California.

“Dear Sir: Yours of the 6th and 7th to hand Glad to hear from you, but I still feel alarmed and uneasy as to father’s condition. I am afraid we won’t have him with us very long. Keep me posted about the California-Nevada. I hope that father will be able to get out of it. Ask him for me what he hears from the Shenandoah and Green Mountain.

“Very truly yours,

“C. H. SMITH.”

Q. I show you now a letter dated Denver, Colorado, November 24, 1897, consisting of ten typewritten pages, and numbered, and with the signature “Very truly yours, C. H. Smith,” at the end, and under that the endorsement “Mr. King, please show that to Mr. Sawyer, C. H. S.,” and ask you if you wrote that letter?

A. That is my signature on the last page. I should say that is my letter. There is no question about it.

Said letter was thereupon offered and admitted in evidence, marked Defendants’ Exhibit No. 24, and is so far as material in this case as follows:

Defendants’ Exhibit No. 24.

“Charles H. Smith, 1613 Blake Street.

“Denver, Colorado, Nov. 24th, 1897.

“W. R. Davis, Esq., Attorney at Law, Oakland, California.

“Dear Sir: Your lengthy communication of the 21st inst. is just received. I am obliged to you for writing me

so fully. I am quite surprised at many of the allegations made by McSorley and De Golia. It seems to be the privilege, at times, for some attorneys to make untruthful and libelous charges. Mr. King was in my father's employ for several years, and I know that father always considered him honest. I do not, and am not prepared to believe at this time that he has done anything wrong, knowing it to be wrong at the time. He may have erred in his judgment, but it is my impression that whatever he has done in connection with the estate matters has been done at the discretion and with the advice of Mr. F. W. Sawyer, the estate's attorney. When all the testimony shall have been given in, it will then show, I believe, that everything has been done properly and correctly.

“Now as to the first item of the complaint against King and myself as to my residence in California, I have this to say: all the proceedings in connection with this matter were had after due consultation with Mr. F. W. Sawyer, the estate's attorney, and upon his advice, which he will verify, viz.: Before I left Denver, I rented my home for one year and made preparations to go to California to live for a time, and took my family with me, and eight trunks of wearing apparel and other personal belongings, with the intention of residing in California for the purpose mainly of nursing my father, hoping thereby to bring back his health and to prolong his life. I went so far as to look around for a furnished room in Oakland, but before all this could be accomplished, my father suddenly died in the fore part of November, 1895. Shortly after his death I moved with my family over to the Pleasanton

Hotel in San Francisco and engaged rooms by the month. In the latter part of December I returned to Denver only with the intention of remaining a short time and intending to join my family shortly thereafter. In March, 1896, I again returned to California and remained there until some time in July of that year, and only then and in that month did I give up my residence with the intention of again returning to Denver. It was my hope, desire, and intention in the latter part of 1895 to go to California, there to take up my residence for at least two or three years. As stated before, the main reason was to nurse my father and be near him, as he had requested me so to do, and the other reasons for going to California were personal and do not need to be elaborated upon, so you will see in this case, so far as fraud is concerned, there was no fraud intended or perpetrated at all. No one knows better than myself what I did do and what was my purpose. This can all be explained to you satisfactorily by Mr. King and Mr. Sawyer, a brother attorney, whom I would suggest that you see.

“As to the other matters of the property being inventoried at \$9,090.10, and being sold for \$4,482.50, I can say but little. However, regarding the sale of the property, I remember that Mr. King said to me that it was all it was worth, and that it was a fair and sufficient price for the property considering the condition it was in and also the great depression in value of all farming and other lands throughout California. It is my impression that he went through all the forms required by the Court, and that after due advertising and notice the property

was disposed of to the highest bidder, he, King, endeavoring to see to the securing of a purchaser, so that the property would not be sacrificed. I think that Mr. Sawyer watched all these matters carefully.

“As to King not instituting suits against members of the family I am of the opinion that he did not think it necessary and that all the property which was deeded to them came to them in a proper and legal way. At this time I cannot recall wherein the estate has any claim or action against Benham & Thomas. As to paying out unnecessary funds to the amount of \$287, I cannot answer. King and his attorney can do so, and I presume that upon showing by them it will be seen to be correct.

“The item of interest on bank deposits there is absolutely nothing in. I do not believe that any interest on bank deposits was ever paid to anyone.

“As to the claim of \$6,000 by Maurer, this surely is also wrong. He has claimed \$200 and says he has a writing from my father in which father agreed to pay him \$200 upon certain contingencies. I have repeatedly written to King and Sawyer that if the claim is just, it of course, should be paid.

“As to paying me items amounting to \$1,274.86, I have this to say: All the items therein contained are correct, and were items which the estate was owing for, and items which my father had contracted for before his death, and which could not be stopped immediately at his death, and were items for which he and the estate were individually liable, all of which can be fully and satisfactorily explained. I have not kept a copy of the

items contained in this bill, but will write to King immediately for a copy. King knew this claim to be just for the reason that he was in close touch with father before his death and knew that it should be paid. I think that Mr. Sawyer did also.

“As to assessments on stock in mining companies, I also know that in the month of August, 1895, father assigned, transferred and delivered to me divers stocks in various mining companies with the particular understanding that he should have absolute control of said stocks during his lifetime, and that in consideration therefor, he would pay all expenses in connection with the same and all assessments levied during his lifetime. This can be very easily proven for the reason that *her* personally made several payments, particularly to the Shenandoah Quartz Mining Company before his death, and after the stock had been assigned to me. This I think King knows all about, and I think Mr. Sawyer does as well, for the reason that these matters were fully explained to him.

“As to the item of \$300 for a monument, this is surely going too far. I think this item will speak for itself.

“As to the claim of J. J. McSorley, I have this to say: It was for labor and material contracted for by my father before his death. McSorley needed the money badly and requested me to advance the money to him, which I did, and he assigned his claim to me after the same had been allowed. This is as straight as a string and there is nothing wrong about it. It was not a claim against the Green Mountain Gold Mining Company. My father

was conducting the properties of the Green Mountain mine on his own personal account. The claim of Allen H. McCarty is exactly in the same box, and is as straight as a string. All this was contracted for by my father as an individual.

“The day following my father’s death when my spirits were naturally disturbed and I was feeling in a condition peculiar to most anyone under those same circumstances, Mr. A. I. McSorley and some other gentlemen accompanying him called on me at the Metropole Hotel and then and there stated many things, all of which I cannot recall, but I can some. In the main, it had reference to the payment of notes made by my father to Mary F. McSorley for a piece of mining property which he had purchased from her. I assured Mr. McSorley at that time that I thought the estate would have sufficient property out of which could be realized a sufficient amount to pay his claim in full and all others and would probably leave a surplus. I also told him at that time what my father had requested me to do in the event of his death, and I have tried to follow it out quite fully. He then wanted to know particularly in regard to the disposition of father’s real estate as to making out all the deeds and recording and the delivery of the same, and as I could see no reason for keeping anything back, and hoping and believing at that time that everything would go along without any friction at all, I told him of the non-delivery of certain deeds, and I also said to him at that time that I did not think he need give himself any uneasiness as I felt that his claim would be paid. I believed so for various reasons. I was in hopes it would not be necessary

to call upon any of the estate's assets to liquidate the claim of McSorley. I thought at that time I would be able to dispose of some railroad bonds which my father had given me, and in that event it was my intention to pay all father's indebtedness and thereby clean up the whole matter, but at a time when I could have sold the bonds and was at the point of delivering the same, some matters arose, especially that of litigation, and nothing can be done until this litigation is settled. I also told McSorley that my father was indebted to two of my sisters to the amount of \$6000. Whether King knew of the circumstances of the delivery of the deed to Mrs. Porter and Mrs. Clark, I can say naught, but I am quite sure that McSorley knew, also Mr. Sawyer. At one time I told Mr. McSorley that my sisters would deed back the land, and I thought this would be more than sufficient to pay his claim. After one of my sisters, Mrs. Clark, had told me they would deed back the land, I wrote to him to this effect, but for reasons, and probably good ones, known to themselves only, they have decided not to do so. As a matter of fact, all the personalty owned by my father at his death belongs to me, and I have a paper showing that to be the case, and which can be pretty nearly construed as a will. The reason for appointing an administrator was for the purpose of cleaning up some matters which at that time, upon consultation with Mr. Sawyer seemed to be the only way out of the matter. I have turned over some little items to the estate, which Mr. King can explain to you, which as a matter of fact belonged to me. While it seems to be a rather mixed

up and nasty mess, yet, upon explanation of all matters it will turn out to be quite clear. I have no fears as to the outcome. Of course, naturally, being a son of the deceased and his having been very kind to me during his lifetime, I am quite anxious that the McSorley claim should be paid, and were I able at this time to liquidate the same, I would do so personally and thus end the matter. Sometime since McSorley wrote to me and wanted me to advise King to commence suit in his own name against certain heirs. I replied that I could not advise Mr. King in the matter, that he had his own attorney, and that for my part if he wished to prosecute the suit I would prefer to have McSorley join with Mr. King, for the reason that I felt that some of my relatives would think that I was pushing the suit with the complainant in the matter. This matter has been exceedingly unpleasant to me, and a very delicate one, for the reason that I do not wish to have any ill feeling between myself and my sisters. I was informed a few days after the death of father that by reason of my having in my possession the deed from father to my sisters, and having failed to deliver the same during his lifetime, that the said deed was null and void. It was not my intention to defraud the estate or to defraud creditors of the estate when I did give the deed to Mary M. Clark and Laura W. Porter, and I think that I can testify to the Court and justify my action in giving this deed to them after father's death. I do not believe that a big war is on, although it looks so from your letter. Certain matters are now under consideration between myself and

my sisters, which if consummated I believe will result in McSorley being satisfied, and in that event, DeGolia will not have a peg to stand on. While DeGolia represents McSorley, still he is mainly urged on by a disgruntled heir, knowing she will receive nothing, but DeGolia thinks he will be able to get something from some source. He is working on a contingency, and that contingency is, I am informed (reliably so), to be one-half of whatever he may get for his client. The said client did live in the city of Cincinnati.

“When it is absolutely necessary for me to come to Oakland, I will try to do so, but in the meantime, I wish you to have McSorley agree to a postponement. I believe upon a request to McSorley, saying that I wish it, that he will immediately request DeGolia to postpone it until I can be heard from. In the meantime I think that King should consult with his attorney, Mr. Sawyer, and have all work in harmony. It won't do for King to ignore Sawyer for various reasons. This would naturally displease Mr. Sawyer, and he might make it unpleasant for Mr. King.

“I will hand your letter to Mr. Porter as you have requested, and will also show him my letter in reply to yours, and if it is necessary to write you again, I will do so. I would suggest that upon receipt of this letter that you send for Mr. King, and arrange for a conference between yourself, Mr. King and Mr. Sawyer. I do not think that at this stage of the game that I would have much to say to De Golia. I do not see that we should give him any information whatsoever. With McSorley satisfied,

De Golia can go ahead, so far as I am concerned, to his heart's content. He will not have a leg to stand on. I will be able to take care of myself without any trouble.

“Very truly yours,

C. H. SMITH.

“Mr. King: Please show this to Mr. Sawyer.

“C. H. S.”

Q. What paper did you refer to Mr. Smith?

A. I cannot just exactly tell you what, that is, I know the paper. It was a paper which he had given to Mr. Palmanteer, another to Mr. King, and I think one to Mr. Benham.

Q. I show you now a paper headed “C. K. King, 902 Broadway, Oakland, Cal.,” and commencing “Oakland, Alameda County, California, October 31st, 1895. Friends C. K. King and A. M. Benham,” signed “J. W. Smith, Witness C. K. King,” and ask you if that is the paper referred to (handing)?

A. Yes, sir. That is my father's signature.

Said document was offered and admitted in evidence marked Defendants' Exhibit No. 25, and is as follows:

Defendants' Exhibit No. 25.

“C. K. King, 902 Broadway, Oakland, Cal.

“Oakland, Alameda County, California, October 31st,
1895.

“Friends C. K. King and A. M. Benham: If the human mind should leave this body commonly called J. W. Smith, you will then say ‘It is dead’ and as usual in such cases should be buried in a tomb or grave—It is my desire that

you (conjointly) if you are well and alive at that time take charge of my remains (one not doing anything without the knowledge of the other unless one might be incapacitated from so acting.) First procure a lot in Mountain View Cemetery. Then arrange with Mr. Brown (undertaker) for a good red-wood coffin and have the corpse placed therein—clothed with a white muslin shroud (no made up—clothes) except a pair of socks, and one of my night shirts and then bury the body and coffin in the grave with as little show and expense as possible only employing 2 carriages and a hearse. And by no means allow the body to be removed to Colorado for burial.

“Have a trunk now setting in the hall of No. 408—13th street, Oakland, placed in the room that I had occupied, fasten all windows and put a lock on hall side of my room door and lock the same then take the key or keys of such lock to C. H. Palmanteer of Central Bank, together with the key of my tin box now in his bank which C. K. King shall hand to him to be kept by him until the arrival of my son C. H. Smith of Denver, Colorado, who shall receive the keys and all effects left by me. As C. K. King has been commissioned by my son to inform him of any change, and to take charge for him until his arrival he shall immediately wire him of the same and he will come out and pay all reasonable expenses.

“J. W. SMITH.”

Mr. CANNON.—Q. Upon the occasion that you have mentioned, when you testified in Oakland in the Superior Court of Alameda County, did you testify as follows: “Q. You got a tin box from Mr. Palmanteer at the bank, didn’t you? A. Yes, sir. Q. When did you get that?”

A. Oh, I had that long before he died. Q. What was in that box? A. Well, a great many of his private papers, stocks, bonds, and so forth. Q. What became of those private papers, stocks, bonds, and so forth? A. There were some of them, some private letters, which I have since probably destroyed. Q. What became of the stocks, bonds, and so forth? A. I have them yet, sir. Q. Anything besides the stocks and bonds you have mentioned? A. No, nothing of any value at all that I recall. Q. You never turned these over to the administrator, any stocks or bonds, did you? A. No, sir, I never did, because they didn't belong to him, they belonged to me. Q. Your father gave all to you before he died? A. Yes. Q. Gave you the box, too? A. Yes, sir. Q. Was there deeds in this box, too? A. No. There had not been deeds in that box. Q. But the stock and bonds given to you were in the box? A. Yes, sir. Q. All of them? A. Yes, sir. Q. All this box contained was the Nevada Railroad bonds, Nevada Railroad share of stock, Shenandoah stock, and Green Mountain stock? A. Yes, and a gold watch, too. The gold watch was not in there, I do not believe."

Q. Did you so testify?

A. Yes, sir.

THEODORE KYTKA, called as a witness for defendant King in surrebuttal testified as follows:

I reside in San Francisco and have resided here about eight years. I am a writing expert and documentary photographer. I have been engaged in that business more or less over fifteen years, may be twenty. I have

had about twenty-two year's experience in photographing documents. I have had experience in the examination of handwriting as an expert since the trial of the Chicago anarchists in 1886. That was my first experience in the United States. I am a native of Vienna, Austria. Since 1886 I have made an examination of handwriting in many hundred cases. I have been in the Fair case, the Botkin case, the Quackenbush case, and in nearly every prominent case that has been here in eight years. I could not recall them. There are so many. I also examine handwriting for the United States postoffice inspectors, the San Francisco police department, and I am doing the State's work. I have had experience in the use of the microscope in examination of handwriting for about fifteen years, and with reference to the examination of inks in the neighborhood of twenty years. I determine whether two documents are written by the same ink. I have made a study of inks that are manufactured. I made a very exhaustive study in detail of ink. I make that a particular specialty. I have a microscope in court. It is the most perfect microscope known to the science of lens grinding and manipulation. It was purchased by the Fair Estate and given to me.

Q. I show you Plaintiff's Exhibit "G" in this case and ask you if you have seen that document before (handing)?

A. Yes, sir, that is his signature to it. I have made an examination of that document at the request of counsel for the defense. I have also seen Defendants' Exhibits Nos. 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16 and 17, being checks bearing the signature of J. W. Smith. I

have also made a comparison of the signature to the disputed writing, Plaintiff's Exhibit "G" with the checks. I made a particularly careful study of the signature "J. W. Smith" to the checks dated July 30, 1895, August 16, 1895, August 15, 1895, August 19, 1895, and September 9, 1895, and October 2, 1895. In addition to that, I made a study of the other exhibits offered and signed "J. W. Smith." I find that the signature to this exhibit, Plaintiff's Exhibit "G," is written by J. W. Smith, but examining the signatures of the checks that I specified from July 30, 1895, to October 2, I noticed a particular tremor in the signature, which would indicate to me that the man was utterly incompetent and physically unable to have written this signature at that time, absolutely impossible under any conditions (referring to exhibit "G"), because the signature to this shows, judging from the ink, the signature must be somewhere between fifteen and twenty years old. Judging from the oxidation of the signature to an exhibit which was made in 1895.

Mr. CANNON.—Q. I show you now Plaintiff's Exhibit "J," dated 1885.

A. That tallies very nicely with this signature. I judge that the signature is a good many years older than the signature there specified. I find that the body of the writing is written in entirely different ink. It is blue black ink. It has not the sulphate of iron that the signature contains. The upper portion of it is written with a blue black ink.

Q. That is the body of the assignment?

A. Yes, sir; the microscope shows me that the signature is written with a dead black ink. In the blotted portion of it, it turns into a grayish brownish black.

Q. What portion particularly does it turn into the grayish brownish black?

A. Wherever there is a smearing; that is the safest mode of examining ink, by examining the blotted portion, or the smeared portion of writing.

Q. What do you find in that ink with reference to oxidizing?

A. That would indicate to me the drying and also the absorption of ink, particularly where the signature is already formed which shows that the oxidizing is well fixed. It takes a good many years to oxidize ink and absorb it into paper.

The COURT.—Q. Do you mean that the oxidation of the signature is greater than the body of the exhibit?

A. Much more. It is entirely different ink. The chemical constituents are entirely different. As to the oxidation the ink shows the precipitate form absorbed by the fiber, which shows it is of much longer duration *that* the above writing. Some inks age faster; and some inks according to where the paper is kept, according to the condition. Then I would state from my examination of seeing a great many documents, that this is in a good state of preservation, and the upper portion of the writing would indicate to my experienced eye, in examining disputed writings, that the upper body of it was written above the signature. There are several reasons for it.

Q. State them.

A. There is one in the beginning, the spacing of it; then the crowding, if you notice; then you notice that this is a first-class penman judging from his signature. If you take the space, you will note he began much lower over here (to the left) and dodged this signature (pointing to the signature of Plaintiff's Exhibit "G"). This space (over the signature) is much higher than from here (pointing to the left side of exhibit "G"). He dodged that signature. The lines go up here, showing that the signature was dodged. The body of the writing is raised, otherwise it would strike the letter "S." There are no lines or pencil lines on the body of the instrument.

The COURT.—Q. What is that (pointing)?

A. That is a pencil mark. You refer to this straight mark?

Q. Yes.

A. That is a crease in the paper. I will put it under the microscope or light. It shows the dash behind the figure "5," and also shows the crease. It is a natural crease.

Q. Now, Mr. Kytka, will you show the oxidation?

A. This shows the stroke in the letter "J" where the ink was out, and you will find black specks with light yellow stains, yellowish stains which are noticed on every old document, according to the keeping, some fifteen or twenty years. Old writings will always show their peculiar yellow lines on any kind of paper. You will not find that on the writing in the body of the instrument, because it is a different ink. It is a recent ink. This is a writing with a blue black ink. It is different com-

position, one giving yellow stains, and the other giving blue black ink. I find the oxidation I speak of in the document of 1885. It is noticed very plainly without the microscope.

The COURT.—Q. If that is on exhibit “G,” if the writing is old, necessarily that is an old piece of paper?

A. Yes, sir, no doubt. I would state, aside from the ink, not taking the ink into consideration at all—here is a check of August 15, 1895, the day after. There is not a clear-cut stroke in that signature, or in any of these, and that is supposed to be written the day after. Here is one a couple of days before exhibit “G,” one check dated August 6th, and one July 30th. These show around this time August 6th and July 30th, the nerves were in such a condition that he could not have written the signature, because there is a tremor and an angle on every stroke, in some of them a couple of days apart, he could not hold the pen before and after; that is only a couple of days apart, August 19th and August 15th. He could not make a clear-cut stroke. Another signature like that, a document like that cannot be produced with that freedom in it (referring to exhibit “J”). If there is another signature produced with a signature like it, I will be willing to change my job. I will drop my job, and never testify again, so certain am I that he did not write it.

Q. Do you notice anything in the edge of that paper, Plaintiff’s Exhibit “G,” to indicate that the paper had at one time been larger?

A. Certainly I do. It shows, your Honor, that this was a piece of larger size, because there is a bend, there

is a folding all along in the signature. You will notice that under the light. It is within an eighth of an inch on this side of the paper as folded—you see that crease. It took even the ink out from the “J.” There is another folding in here, about three-quarters of an inch, and it was trimmed with scissors; it is clear cut. This is not a machine cut. With machine cut they cannot cut a crooked line. They have got to cut straight or not at all.

(The Court here examines under the microscope the disputed signature, and the signatures to the checks introduced in evidence.)

The WITNESS.—It would be much better to take it under a small glass. The magnifying power of this is so very great that I cannot get two of these lines in the field. Your Honor will notice the down stroke of the letter “S” in both of them. You will note the one here shows angular lines, and the other shows a clear definition, a clear-cut line. One shows angularity and the other shows clear-cut lines.

Q. Mr. Kytka, would you say that the clear, well-defined lines that you find in the disputed signature correspond more nearly to those lines in the signature of the document of 1885?

A. Yes, sir, and thereabouts; 1885, and somewhere along there.

Q. And one document of 1890?

A. Somewhere there, yes, sir. There is not a single signature in these checks that I have specified showing the sweep and freedom that there is here—not even an approximation to it.

Q. But you find that sweep and freedom in the early signatures shown you?

A. Yes, sir. The lines are very clear-cut in the earlier signatures.

The COURT.—Q. You mean that there is a rather free sweep of the pen?

A. Yes, sir. It is much similar, but shows great control in the handling of the pen.

Q. Did you also examine Plaintiff's Exhibit "H," dated 1890?

A. Yes, sir. That shows a wonderful sweep. There is a firmness about the strokes that cuts clear to your paper.

Q. Do you know what kind of paper was used originally in Plaintiff's Exhibit "G"? What is the texture of that paper?

A. (After examining paper.) Your Honor, this paper, in my judgment, after an experience of nearly twenty-five years in examining papers, I would state to be taken from a book cover, indicating that it is for printing, just like the name sheet in a book. It is not writing paper; it is printing paper. The texture of it shows that it is a printing paper. It is thin.

Q. If you were to take a document of that size, and a person were to sit at the table with a document not larger than that, and with that character of paper, what would probably be the effect upon the signature, that is, with special reference to a small piece of paper? Could a person write with the freedom with a small piece of paper only before him, as with a larger piece of paper?

A. If it would have been on only a small piece of paper, there could not have been the freedom shown in the signature. But the writing, the lines themselves, show me that there must have been a hard underlying substance, a good surface for the pen to sweep over. I would consider that the paper might have been in a book.

Q. In the fly-leaf of a book?

A. Yes, sir. The texture indicates to me that it is a common printing paper. Judging from the appearance of the document I would say the body of the writing was written after the signature.

Cross-Examination.

Mr. BOLTON.—Q. When were you first spoken to about this case?

A. I received a telephone, I believe it was Saturday—I don't recollect whether it was Saturday or Monday—from Mr. Judkins. I subsequently had an interview with Mr. Judkins. He asked me what were my charges for examining a signature to a document. I told him it depended entirely upon how much work it was. Whether I had to photograph it, or to go through a couple of hundred checks, or a couple of thousand checks. I told him fifty dollars for photographing and examination—not for testifying in court, for which I charge twenty-five dollars per diem. Then for my services in this case I am to receive seventy-five dollars. I have not been paid. I am not in a hurry to get the money. No arrangement was made. Whenever they pay me it is all right, in a month or a year, it is all the same to me. There was no

arrangement that I was to wait until the case was decided. Absolutely no discussion upon that subject. I never saw Mr. Judkins in my life before that interview. I did not have a conference with anybody else. Mr. Cannon walked in and shook hands with me. That is all I have had to do with Mr. Cannon. I do not know Mr. Shurtleff. I just met him yesterday. I first saw the document this morning. I did not photograph it.

Q. Did you make any inquiries at all about getting your pay, how sure your pay was?

A. No, sir; it is a small amount; twenty-five dollars or fifty dollars is nothing to me.

Q. Those small amounts do not interest you at all?

A. They do if they come all right, and if they do not come, I am not going to kick about it. I do just what my science tells me, and I am too independently wealthy to depend on fifty dollars.

Q. What did Mr. Judkins say to you?

A. He said he wished my presence in court to examine a certain writing if it was produced. He did not tell me where I could go and see it if I wanted to.

Q. Did he say whether he was going to produce it, or not?

A. No, sir; it was not in his possession; I knew that.

Q. You knew it was not in his possession?

A. Yes, sir.

Q. Did he tell you what he thought about it?

A. That he thought it was a darned forgery.

Q. And he wanted to get your opinion to see if he would think so?

A. He disputed first the signature. As soon as I saw it, I put him at rest, and told him it was the genuine signature of Mr. Smith, and there was no getting away from it.

Q. You told him there was no doubt about the signature, at all?

A. Not the slightest in my mind. A man that could forge writing like that would not be fighting for bonds; he would be worth millions.

Q. Why did you think the writing was his?

A. Because I was asked to examine it and examined it. My first duty is to examine it to see whether it is the writing or not. I examine all the details pertaining to a disputed document. I was led to think it was Mr. Smith's signature from the characteristics existing in the previous writing, and the characteristics found in the signature on the exhibit. I can tell the different makes of ink by examining them. I could not tell you whether they were home-made, but could tell you with absolute certainty whether two inks are alike without applying the acid. I can tell what particular brand of ink it is. I have got every kind of ink ever introduced in the United States.

Q. How close can you tell the age of writing—within a year?

A. Oh, no, that I could not tell. I could not tell within a year, because it depends entirely upon where the document is kept, how it is kept, and what the chemical effect—whether the alkali or the acid will turn—whether it contains more or less glycerine, and more or less sugar and gum. When ink stands in the open air it thickens.

To some extent that has some effect upon the writing in determining the age of it. It won't corrode so fast, won't make a precipitate so fast, because the air has to act on a greater amount, the lower the ink. Fresh ink out of a bottle operates faster than ink that has been exposed to the air and thickened in the bottle. It will produce an oxidation faster because the atmospheric changes do not act on the underneath layer of the ink as fast as on a thick layer of ink. Do you understand me?

Q. Does the oxidation go on before it spreads, while it is exposed to the air in an ink bottle?

A. There is no oxidation possible in an ink bottle. It has to be dried first. You cannot form a precipitate with it in a wet state.

Q. If the ink has once become dry and set for a number of years, and then again is moistened and used, what would be the effect of that ink?

A. You could not write with it at all.

Q. You could not write with it at all?

A. No, sir; not very well. You could not produce that signature. If ink dries up entirely, and then water is put in it, and it is allowed to stand some reasonable length of time, you could not write with it very well, not with freedom because you could not dissolve the particles. It would show under the microscope like rocks, that the ink was once dry. There is no expert in the United States claiming to tell the age of ink absolutely. I can tell the age of ink to some extent. It is not guess work. It is based on facts existing and found on the document. On Plaintiff's Exhibit "G," the words "J. W.

Smith" have been written there fifteen or twenty years. I could not state how long the other has been written, but that is subsequent. There is no oxidation, absolutely, about that (referring to the body of Plaintiff's Exhibit "G"). I would state that it might have been written somewhere around in the neighborhood of five or six years, may be four years, even as low as three years, because there is no oxidizing yet on any stroke.

Q. It may have been written within a year?

A. I would give it more than that. It is pretty well dried out for that.

Q. May it have been written within a year?

A. No, sir, I would not state that, because it is pretty well dried out. It is not the ink that the expert bases his opinion on, it is the paper; the fiber absorbs certain particles of each and every ink, and then the atmosphere acts on the surrounding particles and the surrounding sides of each stroke. It is very difficult for an expert, without attempting to illustrate it very technically, to give all his reasons for that. But it can be absolutely demonstrated whether two inks are written at the same time, and are of the same age and of the same quality. You take an alkaline that I may select within a few hours' examining, and you make a standard solution, and you take two quills and dip alkali and acid in each quill and place over the stroke disputed, and you can identify them both. You must have the same precipitate on both, and therefore it may be reddish brown under the acid, and purple under the alkali. But they have got to resolve at the same time, within so many minutes. If one

resolves first, it shows that ink is not as old as the other which resolves slower.

Q. There are different kinds of ink?

A. Yes, sir, something like 250. If one ink is of one particular character, for instance, red, and it dries out, and you dip the pen in a black ink, you will get two inks. That can be easily detected under a microscope. You will get a brown black, and the microscope will show a lustre and the little crystals that you notice in the dies. It is very simple to me, because I have made an examination of it many times.

Q. It is just as easy to tell the age of mixed inks as of straight inks?

A. Not always. When there are two constituents of ink very closely related to each other, say, for instance, if he has got a base of red prussiate in one, and the other has protosulphate of iron as a base for coloring, then you can tell, yes. But when you take two inks of the same character, say one that has got a weaker protosulphate of iron base and the other a stronger quality, you cannot tell them very well.

Q. What makes you think this piece of paper came out of a book?

A. I can tell by the quality, the finish of the paper, that is used for printing.

Q. You have not any doubt that it came out of a book?

A. Oh, no, I would not say that. I have no doubt that it is not writing paper; it is printing paper. I referred his Honor only to the fact that paper of that character is

used in printing books. It might have come out of the flyleaf of a book. I suggested that because I have seen that used in fly leaves of books many times before.

Q. Judging from the mesh of the fibre of this paper, you come to the conclusion *that that once* the flyleaf of a book, do you?

A. Yes, sir. I wanted to express it that it might have been used in the flyleaf of a book. I have seen paper duplicating identically in fibre and texture this paper, used in the fly leaves of books. I have seen such paper elsewhere. I have never seen it in any closets, but I have seen it in stores where they sell paper. I make a special study of paper, ink, and pencil.

Q. What is the name of that paper?

A. As I said, if it were separated there, so that I could close my eyes and feel of it apart from the piece it is pasted on to, I could tell you just exactly the weight of it. Paper goes by weight. I can't tell because it is pasted. I can't put my finger on the other side.

Q. Do you have to tell the weight of paper to tell the kinds of paper?

A. Nearly every time when it comes to printing paper. The expert on paper will tell you whether it is 60 pounds or 80 pounds, or 90 or 120, just by closing it between his thumb and finger.

Q. Do you know how to designate the manufacture of that paper, as to how the paper is formed?

A. That is entirely due to the calandring. It is a pulp paper composed of wood. I am positive of that. I can see the wood under the microscope. I can show it to

you. There is some sizing in the paper. A pen would write freely on it. There is no danger of blotting in using that paper. Not what I consider microscopic blotting. This paper is not as well sized as linen paper. If you will examine the upper portion of it you will find that the pen was a much finer quality that wrote the body of it than this one. Why? Because the pen cut into the paper and absorbed fibre, wood. Your Honor, this pen was much finer than this, because it cut into the paper, and you will observe between the two nibs some ink went out and made blotting—that is not blotting, but it is the breaking around of a small particle from the wide track; that is not blotting.

The COURT.—Suppose you should write on this blotter. Is that what would occur?

A. Exactly like that, because it is not any different.

Q. Does not the ink, after it strikes that paper, just distribute itself as water would?

A. Yes, sir, the paper absorbs it, because this is very porous. But that is not the case here (showing).

Q. Is this porous?

A. To some extent, but not as much as blotting paper. Flyleaves of some books are porous to some extent. So is this one porous.

Q. Is that not one of the difficulties of writing a name in the ordinary flyleaf?

A. No, your Honor, speaking of the modern papers, up to within a few years, they put more starch in, and that starch absorbs and fills it, and makes it much more

difficult to write on. It is due to the calendering. That is my technical explanation.

Q. I merely want to know whether or not it is not a fact that in the ordinary book you purchase at a bookstore, the paper of the flyleaves is not of such quality that the ordinary writing distributes the ink around it?

A. Yes, sir, that is to some extent true.

Mr. BOLTON.—Q. Can you tell me who the maker was of the ink in the body of this exhibit?

A. I cannot. I am not prepared to do so. I cannot tell you who the maker of the ink in that signature is. I did not examine it with that in view, at all. I have recorded some 250 inks here, and I could endeavor to find out whether it is a modern ink.

Q. I believe you testified that you could tell the physical condition of a man by his signature, did you not?

A. Yes, sir, every time.

Q. That is, as to his age? A. No, sir.

Q. What difference is there between a man who is nervous in his writing and a man who is drunk?

A. Very little. When I refer to the physical condition I mean the state of the nerves. By a man's signature I can tell whether he is a young man or an illiterate man or of fixed habits. That is all.

Q. Look at that signature without looking at the date. Tell me in your judgment how long before Mr. Smith's death was that written?

A. I cannot tell that; that is impossible.

Q. Is that a pretty steady signature?

A. No, sir.

Q. Not a steady signature?

A. No, sir. That shows a touch of wrecked nerves.

Q. Is there more of that in that one than there was in the other checks shown you?

A. That signature is very close to that.

Q. It is very close to that?

A. Yes, sir. Now, let us see the date.

Mr. CANNON.—I think we are entitled to have it marked as an exhibit, your Honor. (Mr. Bolton withdraws the paper and does not offer it as an exhibit.)

Mr. BOLTON.—Q. How far apart were those signatures (showing)?

A. I could not tell you, but there is a touch also in that.

Q. There is a little touch in this one (showing).

A. Yes, sir.

Q. And a good deal more in this one?

A. Yes, sir; there is more in this.

Q. This was probably written after he grew weaker, was it? A. I cannot say that.

Q. Now, let us see. That is April 21st, and this is October 7th? A. Just what I said.

Q. But that is the later one. That is the one you said was the best?

A. That has got wrecked nerves, also. If your Honor will examine the J. W. Smith there and compare it with this (Plaintiff's Exhibit "G") it cannot compare with it.

Redirect Examination.

Mr. CANNON.—Mr. Kytka, you said something about inks aging more slowly according to the place and conditions under which they had been kept. If a document or signature has been kept in a safe, away from the light and the action of the air, to a certain extent, will it age more slowly than if exposed to the light?

A. Certainly, much slower.

Q. Then a document kept very closely in the safe or very closely in a person's pocket-book would be likely to show age less quickly and have a fresher appearance than if exposed to the air?

A. Yes, sir. The idea is, that you have got to keep away from ink the effects of heat, moisture, and cold. The changes have the biggest effect. In some instances, it peels off almost instantly where there is too much ink and too much sediment, and drops off into a yellow stain.

Q. You said in answer to the Court's question that frequently in books in the store you find fly leaves that absorb ink more quickly?

A. Yes, sir. In some of the cheap books it is just like blotting paper.

Q. You find that they have different kinds of paper in the flyleaves of books, do you not?

A. Yes, sir, it depends upon the quality of the book. Some of them are so cheap, just like blotting paper, and some of them are very fine. Each has the characteristics of printing paper. Your Honor, here is an interesting one. It shows oxidation. It was written in 1787.

It shows that the black is entirely off. The ink, with the exposure to the air, is off, showing the yellow stain.

WILLIAM R. DAVIS, recalled for the plaintiff in rebuttal, testified as follows:

Mr. BOLTON.—Q. State whether or not at any time you trimmed that exhibit "G"?

A. If you refer to the back part of it, yes; if you refer to the front part of it, no—so far as I know. On one occasion about—well, eight or ten months ago, that is, after the hearing or during the hearing in Judge Greene's court, that I spoke of yesterday, Mr. Smith produced this paper, Plaintiff's Exhibit "G," in my office, in the presence of Mr. Bolton and myself. At that time it has pasted on the back of it a receipt, or some blank form which you can see there now, and the edges of that piece pasted on the back, the receipt part, we call it, stuck over the edges of this brown paper about as I show you now (showing) about that much, only the ends were not as long as that—

The COURT.—Q. About an eighth of an inch?

A. Yes, sir, or a quarter of an inch, or something like that. These edges of the back piece were torn, split in several places, both at the top and at the bottom—as to the ends I cannot remember. It looked frayed to me. At any rate Mr. Smith having handed it to me, I took the scissors out of the drawer, and cut very carefully, so as not to cut the brown paper, and got the edge of this white thing down where it would be better taken care of. The thought of my mind was that this torn paper here might run into the brown paper, and tear that, too.

The COURT.—It was the better preservation of the paper?

A. Yes, sir. There were four or five breaks in the outer paper, which stuck out all around from this brown paper, both at the top and bottom and both ends. In trimming that I did it with great care, all that I could with ordinary eyesight, with a pair of long-bladed scissors. If there were fibers of this brown paper sticking on to the white part, the scissors might possibly have touched that, but not to cut into the body of the brown paper.

Mr. BOLTON.—Since you were on the witness stand, have you thought any further upon the subject of when this was first presented to you, when you first saw it?

A. Yes, sir; somewhat. I had a conversation with Mr. Galpin after we left the courtroom yesterday, and certain matters had crystallized in my mind to that extent, simply confirming my belief as I expressed it yesterday.

Mr. GALPIN.—Q. With regard to the citation matter over there in court, will you say now whether you saw that paper before or after that citation for the first time?

A. My memory does not go so far now, Mr. Galpin, as to say positively that I saw this paper before or at that time. But my mind is more strongly confirmed in the belief that that is the fact than it was before I thought of it. Of course, I had not thought of it specially until called here as a witness. But I do not say now, and I did not say yesterday, that I am positive, as an

affirmative act of memory, that I saw this brown paper at or before that hearing, but that is my belief.

Cross-Examination.

I trimmed the back paper on Plaintiff's Exhibit "G" so as not to interfere with the other paper to any extent. You will see now, if you look here, that the line of the white paper, the back piece, shown now right along under the edge of the brown. That is the black. The white paper appears to project a little beyond the buff. There may have been a place—of course, the human eye is not infallible, and I have not examined this with a microscope—where the fibers of the brown paper might have stuck out on the general line of the brown paper where the scissors may possibly have cut them. I would not say as to that but I know I cut with all the care a careful man has, so as not to cut it. I attempted to cut so as not to touch the brown paper with the scissors at all. At the time I cut it the brown paper was in exactly the same shape as it is there. The brown paper showed no frayed edges at that time, none perceptible to the ordinary eye. I can't remember that it showed any wearing or fraying at the edges.

Testimony closed.

The above is all of the testimony introduced on the trial of said action.

The case was thereupon, after argument, submitted to the Court for decision and in due time its findings of fact and conclusions of law as follows, to wit:

Findings of Fact and Conclusions of Law.

[Title of Court and Cause.]

This cause coming on regularly to be heard before the Court, sitting without a jury, a trial by jury having been expressly waived by plaintiff and defendant, Messrs. Galpin & Bolton appearing for plaintiff, Messrs. Gunnison, Booth & Barnett appearing for defendant California Safe Deposit & Trust Company, and Messrs. Whitworth and Shurtleff and W. M. Cannon appearing as attorneys for the defendant C. K. King, oral and documentary evidence was introduced by said parties respectively, the cause was submitted to the court for decision, the Court now finds the following facts:

1. The plaintiff at the time of the commencement of said action was, and now is, a citizen of the State of Colorado, United States of America. The defendants then were and now are citizens of the State of California.

2. The plaintiff, on the 26th day of September, 1900, was, ever since has been, and still is the owner and entitled to possession of the property described in the complaint; and said property was at all of said dates and times of the value of forty-seven thousand five hundred dollars (\$47,500); the defendants at all said dates and times unlawfully withheld and now retain the possession of said property described in plaintiff's complaint from the possession of the plaintiff.

3. At all said dates the defendant, the California Safe Deposit and Trust Company, did not claim, nor does it now claim to have, nor does it have any interest in said

property except as bailee of plaintiff, but now withholds said property from the possession of plaintiff on the claim that it is property of defendant King, as administrator of the estate of J. W. Smith, deceased.

4. That neither defendant King, as administrator of the estate of J. W. Smith, deceased, nor said estate of J. W. Smith deceased, has or ever had any interest in said property, and the defendant C. K. King, as administrator of said estate, is not entitled to the possession of said personal property, or any part thereof, nor is said defendant corporation entitled to longer hold possession thereof from plaintiff.

CONCLUSION OF LAW.

That the plaintiff is entitled to recover of and from the defendants the possession of the property alleged and set forth in plaintiff's complaint; and that defendants unlawfully withhold the possession thereof.

Dated San Francisco, March 26th, 1901.

WM. W. MORROW,
Judge.

Thereafter, on the 26th day of March, 1901, said Court made and entered a judgment in favor of plaintiff and against defendants for the possession of the property described in the complaint.

The following exceptions were then and there duly taken by the defendant C. K. King, as administrator of the estate of J. W. Smith, deceased, and the said defendant hereby tenders this its bill of exceptions to the Court, and the Court does hereby sign and seal the same.

Exception No. 1.

The defendant excepted to the finding of fact numbered 1, which reads as follows:

"The plaintiff at the time of the commencement of said action was, and now is, a citizen of the State of Colorado, United States of America. The defendants then were, and now are, citizens of the State of California."

Exception No. 2.

The defendant excepted to so much of finding of fact numbered 2 as reads as follows:

"The plaintiff, on the 26th day of September, 1900, was, ever since has been and still is the owner and entitled to the possession of the property described in the complaint."

Exception No. 3.

The defendant excepted to the finding of the Court that at the time of the commencement of the action, or on the 26th day of September, 1900, the plaintiff was the owner of the property described in the complaint.

Exception No. 4.

The said defendant excepted to the finding of the Court that on the 26th day of September, 1900, or at the time of the commencement of the action, the plaintiff was entitled to the possession of the property described in the complaint.

Exception No. 5.

The said defendant excepted to so much of finding of fact numbered 2 as reads as follows:

“Said property was at all of said dates and times of the value of forty-seven thousand five hundred dollars (\$47,500).”

Exception No. 6.

The said defendant excepted to so much of finding of fact numbered 2 as reads as follows:

“The defendants at all said dates and times unlawfully withheld and now retain the possession of said property described in plaintiff’s complaint from the possession of plaintiff.”

Exception No. 7.

The said defendant excepted to finding of fact numbered 3, which reads as follows:

“At all said dates the defendant, the California Safe Deposit and Trust Company, did not claim, nor does it now claim to have, nor does it have any interest in said property except as bailee of plaintiff, but now withholds said property from the possession of plaintiff on the claim that it is the property of defendant King, as administrator of the estate of J. W. Smith, deceased.”

Exception No. 8.

The said defendant excepted to finding of fact numbered 4, which reads as follows:

“That neither defendant King, as administrator of the estate of J. W. Smith, deceased, nor said estate of J. W. Smith, deceased, has or ever had any interest in said property and the defendant C. K. King, as administrator of said estate, is not entitled to the possession of said personal property, or any part thereof, nor is said defend-

ant corporation entitled to longer hold possession thereof from plaintiff.”

Exception No. 9.

The said defendant excepted to so much of finding of fact numbered 4 as states that the defendant King, as administrator of the estate of J. W. Smith, deceased, has not or ever had any interest in the property described in the complaint and that said defendant King, as such administrator was not entitled to the possession of said personal property or any part thereof.

Exception No. 10.

The said defendant excepted to so much of finding of fact numbered 4 as states that the estate of J. W. Smith, deceased, has not and never had any interest in the property described in the complaint and is not entitled to the possession of said personal property or any part thereof.

Exception No. 11.

The said defendant excepted to the finding of the Court that said corporation is not entitled to longer hold possession of said personal property from the plaintiff.

Exception No. 12.

The said defendant excepted to the conclusion of law which reads as follows:

“That the plaintiff is entitled to recover of and from the defendants the possession of the property alleged and set forth in plaintiff’s complaint; and that defendants unlawfully withhold the possession thereof.”

Exception No. 13.

The said defendant excepted to the making, rendering, and giving the judgment given, made, and entered in this case, for the reason that the same is against law, and contrary to the evidence.

Exception No. 14.

The said defendant excepted to the giving and rendering judgment in favor of the plaintiff (defendant in error) and against the defendant (plaintiff in error).

Exception No. 15.

The said defendant excepted to the finding of the Court that the evidence was sufficient to show that plaintiff was at any of the times mentioned in the complaint the owner or entitled to the possession of the property described in the complaint or any part thereof.

And now, in furtherance of justice and that right may be done defendant C. K. King, as administrator of the estate of J. W. Smith, deceased, presents the foregoing as his bill of exceptions in this case and prays that the same may be settled and allowed, and signed, sealed, and certified by the Judge, as provided by law.

WHITWORTH & SHURTLEFF and
W. M. CANNON,

Attorneys for Defendant C. K. King, as Administrator.

The foregoing bill of exceptions is correct, and is hereby allowed and settled.

WM. W. MORROW,
Circuit Judge of the United States Circuit Court, Ninth
Circuit, Northern District of California.

[Endorsed]: Proposed bill of exceptions.

Received copy of the within proposed bill of exceptions admitted by copy this 25th day of April, 1901.

GALPIN & BOLTON,
Attorneys for Plaintiff.

Filed April 25th, 1901. Southard Hoffman, Clerk. By W. B. Beazley, Deputy Clerk. Bill of Exceptions (settled and allowed). Filed May 3, 1901. Southard Hoffman, Clerk. By W. B. Beazley, Deputy Clerk.

In the Circuit Court of the United States, in and for the Ninth Circuit, Northern District of California.

CHARLES H. SMITH,

Plaintiff,

vs.

THE CALIFORNIA SAFE DEPOSIT
& TRUST COMPANY (a Corpora-
tion), and C. K. KING, as Adminis-
trator of the Estate of J. W. SMITH,
Deceased,

Defendants.

Petition for Writ of Error.

C. K. King, as administrator of the estate of J. W. Smith, deceased, one of the defendants in the above-entitled action, feeling himself aggrieved by the decision and judgment of this Honorable Court entered in this cause on the twenty-sixth day of March, 1901, does through and by his attorneys, Messrs. Whitworth & Shurtleff and W. M. Cannon, respectfully, petition and pray this Court for the allowance of a writ of error from said decision and judgment to the United States Circuit Court of Appeals in and for the Ninth Judicial Circuit, under and according to the laws of the United States in that behalf made and provided; and also that an order may be made fixing the amount of security and bond

which defendant should give and furnish upon said writ of error, and that upon the giving of said security and bond all further proceedings in this Court be suspended and stayed until the determination of said writ of error by said Circuit Court of Appeals in and for the Ninth Judicial Circuit, and prays that a transcript and record of the proceedings in the cause, duly authenticated, may be transmitted to said Circuit Court of Appeals.

Your petitioner and appellant herewith presents and files with the Clerk of this Honorable Court its assignment of errors.

WHITWORTH & SHURTLEFF,

W. M. CANNON,

Attorneys for Petitioner and Appellant.

It is ordered that the prayer of said petitioner be allowed and that said writ of error issue as prayed for.

WM. W. MORROW,

Judge.

[Endorsed]: Filed April 5, 1901. Southard Hoffman, Clerk. By W. B. Beazley, Deputy Clerk.

*In the Circuit Court of the United States, Ninth Circuit
Northern District of California.*

CHARLES H. SMITH,

Plaintiff,

vs.

THE CALIFORNIA SAFE DEPOSIT
& TRUST COMPANY (a Corpora-
tion), and C. K. KING, as Adminis-
trator of the Estate of J. W. SMITH,
Deceased,

Defendants.

No. 12,983.

Assignment of Errors.

Now comes C. K. King, administrator of the estate of J. W. Smith, deceased, one of the defendants in the above-entitled action, by his attorneys, Messrs. Whitworth & Shurtleff, and W. M. Cannon, and upon the records and proceedings in this case, assigns the following errors, to wit:

1. That the Court erred in making the finding of fact numbered 1, which reads as follows:

“The plaintiff at the time of the commencement of said action was, and now is, a citizen of the State of Colorado, United States of America. That defendants then were, and now are, citizens of the State of California.”

2. That the Court erred in finding so much of the finding of fact numbered 2 as reads as follows:

“The plaintiff, on the 26th day of September, 1900, was, ever since has been, and still is the owner and entitled to the possession of the property described in the complaint.”

3. That the Court erred in finding that at the time of the commencement of the action, or on the 26th day of September, 1900, the plaintiff was the owner of the property described in the complaint.

4. That the Court erred in finding that on the 26th day of September, 1900, or at the time of the commencement of the action, the plaintiff was entitled to the possession of the property described in the complaint.

5. That the Court erred in finding so much of finding of fact numbered 2 as reads as follows:

“Said property was at all of said dates and times of the value of forty-seven thousand five hundred dollars (\$47,500).”

6. That the Court erred in finding so much of finding of fact numbered 2 as reads as follows:

“The defendants at all said dates and times unlawfully withheld and now retain the possession of said property described in plaintiff’s complaint from the possession of plaintiff.”

7. The Court erred in making the finding of fact numbered 3, which reads as follows:

“At all said dates the defendant, the California Safe Deposit and Trust Company did not claim, nor does it now claim to have, nor does it have, any interest in said

property except as bailee of plaintiff, but now withholds said property from the possession of plaintiff on the claim that it is the property of defendant King, as administrator of the estate of J. W. Smith, deceased.”

8. The Court erred in making finding of fact numbered 4, which reads as follows:

“That neither defendant King, as administrator of the estate of J. W. Smith, deceased, nor said estate of J. W. Smith, deceased, has or ever had any interest in said property and the defendant C. K. King, as administrator of said estate, is not entitled to the possession of said personal property, or any part thereof, nor is said defendant corporation entitled to longer hold possession thereof from plaintiff.”

9. The Court erred in so much of finding numbered 4 as states that the defendant King, as administrator of the estate of J. W. Smith, deceased, has not, or ever had, any interest in the property described in the complaint, and that said defendant King, as such administrator, was not entitled to the possession of said personal property or any part thereof.

10. The Court erred in so much of finding numbered 4 as states that the estate of J. W. Smith, deceased, has not, and never had any interest in the property described in the complaint, and is not entitled to the possession of said personal property or any part thereof.

11. The Court erred in its finding that said corporation is not entitled to longer hold possession of said personal property from the plaintiff.

12. The Court erred in its conclusion of law which reads as follows:

“That the plaintiff is entitled to recover of and from the defendants the possession of the property alleged and set forth in plaintiff’s complaint; and that defendants unlawfully withhold the possession thereof.”

13. That the Court erred in making, rendering, and giving the judgment given, made, and entered in this case, for the reason that the same is against law, and contrary to the evidence.

14. That the Court erred in giving and rendering judgment in favor of the plaintiff (defendant in error) and against the defendant King (plaintiff in error).

15. That the Court erred in finding that the evidence was sufficient to show that plaintiff was at any of the times mentioned in the complaint, the owner, or entitled to the possession of the property described in the complaint or any part thereof.

WHITWORTH & SHURTLEFF,
W. M. CANNON,
Attorneys for Defendant C. K. King.

[Endorsed]: Filed April 5, 1901. Southard Hoffman, Clerk. By W. B. Beazley, Deputy Clerk.

*In the Circuit Court of the United States, in and for the Ninth
Circuit, Northern District of California.*

CHARLES H. SMITH,

Plaintiff,

vs.

THE CALIFORNIA SAFE DEPOSIT
& TRUST COMPANY (a Corpora-
tion), and C. K. KING, the Adminis-
trator of the Estate of J. W. SMITH,
Deceased,

Defendants.

Order Allowing Writ of Error and Staying Proceedings.

The defendant, C. K. King, as admisistrator of the estate of J. W. Smith, deceased, having this day filed his petition for a writ or error from the decision and judgment of this Court entered herein, to the United States Circuit Court of Appeals, in and for the Ninth Judicial Circuit, and also praying that an order be made fixing the amount of security which defendant should give and furnish upon said writ of error, and that upon the giving of said security, all further proceedings of this Court be suspended and stayed until the determination of said

writ or error by said United States Circuit Court of Appeals in and for the Ninth Judicial Circuit, and said petition having this day been allowed.

Now, therefore, it is ordered that upon the said defendant, C. K. King, as administrator of the estate of J. W. Smith, deceased, filing with the clerk of this Court within five days of the date hereof a good and sufficient bond in the sum of fifty thousand dollars, said bond to be approved by the Court, that all further proceedings in this Court be, and they are hereby, suspended and stayed until the determination of said writ of error by said United States Circuit Court of Appeals.

All proceedings stayed for five days from the date hereof.

Dated April 5th, 1901.

WM. W. MORROW,
Judge.

[Endorsed]: Filed April 5, 1901. Southard Hoffman,
Clerk. By W. B. Beaizley, Deputy Clerk.

*In the Circuit Court of the United States, Ninth Circuit,
Northern District of California.*

CHARLES H. SMITH,

Plaintiff,

vs.

THE CALIFORNIA SAFE DEPOSIT
AND TRUST CO. (a Corporation), and
C. K. KING, as Administrator of the
Estate of J. W. SMITH, Deceased,
Defendants.

No. 12,983.

[50c. I. R. Stamp. Canceled Apr. 10, 1901. U. S. F.
& G. Co.]

[50c. I. R. Stamp. Canceled Apr. 10, 1901. U. S. F.
& G. Co.]

Supersedeas Bond on Writ of Error.

Know all men by these presents, that C. K. King, as administrator of the estate of J. W. Smith, deceased (defendant above named), as principal, and the United States Fidelity and Guaranty Company of Baltimore, Maryland, a corporation organized and existing under the laws of the State of Maryland, and having the power to execute and guarantee bonds and undertakings in judicial proceedings and empowered to transact business in the State of California, as surety, are held and firmly bound unto Charles H. Smith (the above-named plaintiff) in the full sum of fifty thousand (\$50,000.00) dollars,

to be paid to said Charles H. Smith, his heirs, executors, administrators, or assigns, to which payment, well and truly to be made said C. K. King binds himself, his heirs, executors, and administrators, and said surety binds itself, its successors and assigns jointly and severally, firmly by these presents.

Sealed with our seals and dated this 10th day of April, 1901.

Whereas, lately in the Circuit Court of the United States, in and for the Ninth Circuit, Northern District of California, in a suit pending in said court between Charles H. Smith, plaintiff, and C. K. King, as administrator of the estate of J. W. Smith, deceased, and the California Safe Deposit and Trust Company a corporation, defendants, judgment was rendered and entered on the 26th day of March, 1901, against the said defendants, and in favor of said plaintiff, and the said defendant C. K. King, as administrator of the estate of J. W. Smith, deceased, having obtained from the said Court its writ of error to reverse the judgment in the aforesaid suit, and a citation directed to the above-named plaintiff, and to the defendant, the California Safe Deposit and Trust Company, a corporation, citing and admonishing them, and each of them, to appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California.

Now, the condition of the above obligation is such, that if the said C. K. King, as administrator of the estate of J. W. Smith, deceased (plaintiff in error), shall prosecute the said writ to effect and answer all damages

and costs, if he fails to make good his plea, then the above obligation to be void; else to remain in full force and effect.

In witness whereof, the said C. K. King hath hereunto set his hand and seal, and the said the United States Fidelity and Guaranty Company has caused its corporate seal to be hereunto affixed and its corporate name to be hereunto signed, and these presents to be executed by its proper officers thereunto duly authorized, this 10th day of April, 1901.

C. K. KING,

Corporate Seal of U. S. THE UNITED STATES FIDELITY
Fidelity & Guaranty Co.] AND GUARANTY COMPANY,

By its Attorney in Fact,

JOHN H. ROBERTSON.

State of California, }
City and County of San Francisco. } ss.

On this 10th day of April, A. D. one thousand nine hundred and one (1901), before me, James L. King, a notary public in and for said city and county, residing therein, duly commissioned and sworn, personally appeared John H. Robertson, known to me to be the person whose name is subscribed to the within instrument as the attorney in fact of the United States Fidelity and Guaranty Company, a corporation, and the said John H. Robertson acknowledged to me that he subscribed the name of The United States Fidelity and Guaranty Company thereto as principal and his own name as attorney in fact.

In witness whereof, I have hereunto set my hand and affixed my official seal, at my office in the city and county of San Francisco, the day and year first above written.

[Notarial Seal] JAMES L. KING,
Notary Public in and for the City and County of San
Francisco, State of California.

Approved.

WM. W. MORROW, |
Judge. |

[Endorsed]: Filed April 10, 1901. Southard Hoffman, Clerk.

—————
In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

CHARLES H. SMITH,

Plaintiff,

vs.

CALIFORNIA SAFE DEPOSIT AND
TRUST COMPANY (a Corporation),
and C. K. KING, as Administrator of
the Estate of J. W. SMITH, Deceased,

Defendants.

No. 12,983.

Clerk's Certificate to Record on Writ of Error.

I, Southard Hoffman, Clerk of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, do hereby

certify the foregoing one hundred and seventy-five (175) written pages, numbered from 1 to 175, inclusive, to be a full, true, and correct copy of the record and of the proceedings in the above and therein-entitled cause, as the same remains of record and on file in the office of the clerk of said court, and that the same constitute the return to the annexed writ of error.

I further certify that the cost of the foregoing return to writ of error is \$102.95, and that said amount was paid by C. K. King, as administrator of the estate of J. W. Smith, deceased, one of the defendants above named.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Circuit Court this 8th day of May, A. D. 1901.

[Seal]

SOUTHARD HOFFMAN,

Clerk of the United States Circuit Court, Ninth Judicial Circuit, Northern District of California.

[Ten Cent U. S. Int. Rev. Stamp. Canceled.]

Writ of Error.

UNITED STATES OF AMERICA—ss.

The President of the United States, to the Honorable, the Judges of the Circuit Court of the United States for the Ninth Circuit, Northern District of California, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, or some of you, between C. K. King, as administrator of the estate of J. W. Smith, de-

ceased, plaintiff in error, and Charles H. Smith, and the California Safe Deposit and Trust Company, a corporation, defendants in error, a manifest error hath happened, to the great damage of the said C. K. King, as administrator of the estate of J. W. Smith, deceased, plaintiff in error, as by his complaint appears.

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, on the ninth day of May next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the United States, the tenth day of April, in the year of our Lord one thousand nine hundred and one (1901).

[Seal] SOUTHARD HOFFMAN,
Clerk of the Circuit Court of the United States, for the
Ninth Circuit, Northern District of California.

Allowed by:

WM. W. MORROW,
Judge.

Service of within writ and receipt of a copy thereof is hereby admitted this tenth day of April, 1901.

GALPIN & BOLTON,

Attorneys for Charles H. Smith, Defendant in Error.

GUNNISON, BOOTH & BARTNETT,

Attorneys for California Safe Deposit & Trust Co., Defendant in Error.

The answer of the Judges of the Circuit Court of the United States of the Ninth Judicial Circuit, in and for the Northern District of California.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned at the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

By the Court.

[Seal]

SOUTHARD HOFFMAN,

Clerk.

[Endorsed]: No. 12,983. Circuit Court of the United States, Ninth Circuit, Northern District of California. C. K. King, as Administrator, etc., Plaintiff in Error, vs. Charles H. Smith, California Safe Deposit and Trust Co., a corporation, Defendants in Error. Writ of Error. Filed April 10, 1901. Southard Hoffman, Clerk. By W. B. Beazley, Deputy Clerk.

Citation.

UNITED STATES OF AMERICA—ss.

The President of the United States, to Charles H. Smith
and the California Safe Deposit and Trust Company,
a Corporation, Greeting:

You are hereby cited and admonished to be and appear
at a United States Circuit Court of Appeals, for the
Ninth Circuit, to be holden at the city of San Francisco,
in the State of California, on the ninth day of May next,
pursuant to a writ of error filed in the clerk's office of the
Circuit Court of the United States, Ninth Circuit, North-
ern District of California, in a certain action numbered
12,983, wherein C. K. King, as administrator of the es-
tate of J. W. Smith, deceased, is plaintiff in error, and
you are defendants in error to show cause, if any there
be, why the judgment rendered against the said plain-
tiff in error as in the said writ of error mentioned, should
not be corrected, and why speedy justice should not be
done to the parties in that behalf.

Witness, the Honorable WM. W. MORROW, Judge of
the United States Circuit Court, Ninth Circuit, Northern
District of California, this tenth day of April, A. D. 1901.

WM. W. MORROW,
Judge.

Service of within citation and receipt of a copy there-
of is hereby admitted this tenth day of April, 1901.

GALPIN & BOLTON,
Attorneys for Charles H. Smith, Defendant in Error.
GUNNISON, BOOTH & BARTNETT,
Attorneys for California Safe Deposit and Trust Co., De-
fendant in Error.

[Endorsed]: No. 12,983. Circuit Court of the United States, Ninth Circuit, Northern District of California. C. K. King, as Admr. etc., vs. California Safe Deposit and Trust Co. (a corporation) and Charles H. Smith. Citation. Filed April 10, 1901. Southard Hoffman, Clerk. By W. B. Beazley, Deputy Clerk.

[Endorsed]: No. 700. In the United States Circuit Court of Appeals for the Ninth Circuit. C. K. King, as Administrator of the Estate of J. W. Smith, Deceased, Plaintiff in Error, vs. Charles H. Smith and the California Safe Deposit and Trust Company (a Corporation), Defendants in Error. Transcript of Record. In error to the Circuit Court of the United States, of the Ninth Judicial Circuit, in and for the Northern District of California.

Filed May 9, 1901.

F. D. MONCKTON,
Clerk.

